(1)

90-597

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT and ANA C.,

Petitioner,

vs.

MIGUEL T. and LOUISE N.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

ALAN D. SCHEINKMAN
Counsel of Record for Petitioners
3 Barker Avenue
White Plains, New York 10601
(914) 686-9310

RONALD J. BAVERO
FINK, WEINBERGER, P.C.
Co-Counsel for Petitioners
11 Martine Avenue
White Plains, New York 10601
(914) 682-7700

QUESTIONS PRESENTED FOR REVIEW

Under New York's Domestic Relations Law, the out of wedlock father of a baby placed for adoption at or shortly after birth has the absolute right to veto the adoption if he: (a) openly lives with the mother or the child during the six months before the adoption placement; (b) openly acknowledges his paternity during such period; and (c) pays reasonable pregnancy and birth expenses. The questions presented for review are:

1. Is this provision of the New York Domestic Relations Law violative of the equal protection and/or due process clauses of the Fourteenth Amendment to the Constitution of the United States?

The New York Court of Appeals held that the statute is unconstitutional on its face.

2. Does an out-of-wedlock father, who has failed to form a legal or *de facto* family unit, as defined under the historic practices of our society, have a constitutionally protected liberty interest in developing a future relationship with a newborn infant?

The New York Court of Appeals held that he does.

3. In determining whether the out of wedlock father of a newborn infant should be granted an absolute veto of the adoption of the infant, may the State consider the nature of the relationship between the father and mother?

The New York Court of Appeals held that it may not, not even here, where the mother reported that the child was the product of a rape by the father and where the mother had been repeatedly assaulted prior to, during, and after pregnancy, by the father.

4. Are the liberty interests of out of wedlock fathers in adoption proceedings sufficiently protected by a carefully drawn statutory scheme which liberally grants to broad classes of fathers the right to notice of adoption proceedings and the right to participate in hearings on whether the adoptions are in the children's best interests, though an absolute veto is conferred only in narrower circumstances?

The New York Court of Appeals held that the right to participate in a best interest hearing is insufficient protection.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT and ANA C.,

Petitioner,

vs.

MIGUEL T. and LOUISE N.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Robert and Ana C. petition for a writ of certiorari to review the order of the Court of Appeals of the State of New York which determined that Section 111 (subd. 1 [e]) of the New York Domestic Relations Law violates the provisions of the United States Constitution.

OPINIONS BELOW

The order of the Court of Appeals of the State of New York, entered on July 10, 1990 (A-1), and the accompanying opinion by Judge Judith S. Kaye (A-2), are reported at 76 N.Y.2d 387, 559 N.Y.S.2d 855, 59 U.S.L.W. 2062. The Court of Appeals

reversed the order and opinion of the Appellate Division of New York State Supreme Court, Second Department, entered September 11, 1989 (A-21), which held the statute constitutional, both on its face and as applied. The Appellate Division opinion is reported at 150 A.D.2d 23, 545 N.Y.S.2d 379. This adoption matter originated in the Family Court of the State of New York, County of Westchester, where the trial court, in an unreported decision and order, entered May 10, 1989 (A-30), held the statute to be unconstitutional as applied.

JURISDICTION

This petition for certiorari is from a final order of the Court of Appeals of the State of New York, entered July 10, 1990, which determined that Section 111 (subd. 1 [e]) of the New York Domestic Relations Law is violative of the Constitution of the United States. Jurisdiction to review this determination is conferred upon this Court by 28 U.S.C. §1257 (subd. a) as the decision below is a final determination by the highest court of a State which draws into question the validity of a state statute on the ground of its being repugnant to the federal Constitution.

The Court of Appeals concluded below that, in light of its conclusion that the statute is unconstitutional, it would judicially construct a interim state law standard for measuring whether unwed fathers of newborn infants should be afforded an absolute veto over adoptions. (A-18). This adoption matter was ordered remitted to the Appellate Division, Second Department for a factual determination as to whether Respondent Miguel T. meets the requirements of the interim judicial standard, a question of state law.

The order of the Court of Appeals, notwithstanding its remittitur for further proceedings, is a final order for purposes of 28 U.S.C. §1257. The federal issue (whether Section 111 [1][e] of the Domestic Relations Law violates the United States Constitution) has been finally determined and further review of that issue cannot be had, whatever the ultimate outcome of the case. If Petitioners ultimately prevail on the state law issue on remand, the federal issue will be mooted and Petitioners, as well as

adoptive parents similarly situated, the State and other interested persons, will be deprived of any opportunity to have the federal issue reviewed here – an extreme hardship given the invalidation of an entire statutory scheme. On the other hand, if Respondent Miguel T. prevails on the state law issue, the only further possible review would be by the Court of Appeals which would consider only the state law issue and which would not allow Petitioners to again present the federal issue for review. Under such circumstances, this Court has consistently found finality. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *Florida v. Myers*, 466 U.S. 380 (1984); *New York v. Quarles*, 467 U.S. 649 (1984); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-485 (1975); *California v. Stewart*, 384 U.S. 436, 498 n.71 (1966); *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 159-164 (1973); see Stern, Gressman, Shapiro, Supreme Court Practice (6th Ed. 1986), §3:10, pp. 130-131.

CONSTITUTIONAL PROVISIONS INVOLVED

Due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Section 111 of the New York State Domestic Relations Law:

> **§ 111: Whose Consent Required**
>
> 1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:
>
> . . .
>
> (e) Of the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time he is placed for adoption, but only

> if: (i) such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and (ii) such father openly held himself out to be the father of such child during such period; and (iii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child. . . .

Section 111-a of the New York State Domestic Relations Law:

> **§ 111-a Notice in certain proceedings to fathers of children born out-of-wedlock**
>
> . . .
>
> 2. Persons entitled to notice, pursuant to subdivision one of this section, shall include:
>
> (a) any person adjudicated by a court in this state to be the father of the child; . . .
>
> (g) any person who was married to the child's mother within six months subsequent to the birth of the child. . . .
>
> . . .
>
> 3. The provisions of this section shall not apply to persons entitled to notice pursuant to section one hundred eleven.
>
> The sole purpose of notice under this section shall be to enable the person served pursuant to subdivision two to present evidence to the court relevant to the best interests of the child. . . .

HOW THE FEDERAL QUESTION WAS RAISED

From the inception of the proceedings below, Respondent Miguel T. asserted a constitutionally based right to veto this adoption. Prior to the commencement of the hearing in Family

Court, Respondent Miguel T. asserted, both orally and in writing, that denying him the absolute right to veto this adoption would violate his rights under the United States Constitution. In so doing, he conceded that he could not meet the criteria fixed by Domestic Relations Law §111 (subd. 1 [e]). The Court of Appeals explicitly wrote in its opinion that its determination was based exclusively on Federal constitutional principles.

STATEMENT OF THE CASE

Domestic Relations Law §111 (subd. 1 [e]) was enacted in the wake of this Court's decision in *Caban v. Mohammed*, 441 U.S. 380 (1979). In *Caban*, this Court declared the predecessor statute unconstitutional because that statute denied *all* out-of-wedlock fathers the opportunity to veto a proposed adoption. This Court declared that the total exclusion of out-of-wedlock fathers was an "overbroad generalization" that unconstitutionally discriminated "against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child." 441 U.S. at 394. Significantly, Mr. Caban himself had been identified as the father on the children's birth certificate, had actually lived with the children for *over five years*, and had paid support.

Much confusion followed *Caban*. Though *Caban* involved a father who had publicly acknowledged his children, had lived with them for a substantial period of time and paid support for them, some courts read *Caban* as giving *every* father of an out-of-wedlock child the right to veto a proposed adoption. As a result, adoptions were impeded by the need to give notice to, and obtain the consent of, unwed fathers who had not manifested the slightest interest in their children. Other courts held lengthy and protracted hearings into the father's activities during pregnancy and, after hearing the evidence, used entirely subjective criteria to determine whether the father had done enough to fit within *Caban*.

To remedy the statutory void left by *Caban*, New York enacted Dom. Rel. L. §111 (subd. 1 [e]). The new statute sought to make it clear that the father's consent for the adoption of a newborn

is mandatory only where he has developed a protected family relationship, as shown by living with the mother or the child for the prior six months, openly acknowledging the child, and paying for pregnancy and birth expenses.

The enactment of §111 (1) (e) not only accommodated the constitutional rights of unwed fathers but also promoted adoption and protected the rights of adoptive children and adoptive families to have their futures decided expeditiously and finally. The Court of Appeals, in misplaced reliance upon this Court's prior precedents, has displaced the carefully drafted, objective statutory criteria for measuring whether an unwed father has manifested such a true and real commitment to a unitary family as to be entitled to a veto of the adoption of the child.

The Court of Appeals has totally misconstrued this Court's prior decisions in *Caban* and in *Lehr v. Robertson*, 463 U.S. 248 (1983) where this Court sustained part of the statutory scheme at issue herein. Most critically, the Court of Appeals entirely rejected the analysis of this Court's prior decisions which was provided by the plurality opinion by Justice Antonin Scalia in last Term's decision in *Michael H. v. Gerald D.*, ____ U.S. ____, 109 S.Ct. 2333 (1989). Justice Scalia held that *Caban*, *Lehr*, and the other leading precedents of this Court recognized the liberty interests of unwed fathers, not in isolation, but only where their relationship "has been treated as a protected family unit under the historic practices of our society. . . ." 109 S.Ct. at 2342. The cohabitation requirement imposed by the statute here is entirely in keeping with this analysis. As found by the Appellate Division below, §111 (subd. 1 [e]) "serves the salutary purpose of ensuring that the consent of an unmarried father to an adoption will be required where a meaningful family relationship has been established". (A-25).

Particularly appalling is the conclusion of the Court of Appeals that this Court's prior precedents preclude consideration of the relationship between the unmarried father and unmarried mother. (A-16). In so holding, the Court of Appeals all but ignored Justice Scalia's admonition against viewing a liberty interest "in isolation from its effect upon other people. . . ." 109

S.Ct. at 2343 n.4. Of special importance here, Justice Scalia specifically rejected the notion that a rapist, by impregnating his victim, may forge a liberty interest unaffected by the brutality exhibited by father against mother. *Id.*

The Court of Appeals' invalidation of §111 (subd. 1 [e]) could hardly have been made in a more inappropriate case, given the violent and abusive nature of the unwed father's conduct toward the biological mother which caused the pregnancy and which continued during pregnancy. As the Appellate Division duly noted, the child was, according to the biological mother, the product of a rape by Respondent Miguel T.; Miguel T. brutally assaulted the biological mother on several different occasions (some during the pregnancy), leading to numerous orders of protection (which he violated) and to criminal convictions; he failed to pay child support, leading to Family Court proceedings; he failed to assist the biological mother in caring for the child, and, because the biological mother could not care for the child, the child was placed, first in boarding care and later for adoption. (A-22, A-23); 150 A.D.2d at 25, 545 N.Y.S.2d at 381.

That the Appellate Division found the relationship to be "tumultuous" and the conduct of Appellant to be "violent" (A-28) is entirely consistent with the findings of the Family Court. That Court described the relationship as "turbulent" (A-36), finding that the biological parents "were suspicious of one another"; "didn't trust one another"; and did not have "total obligation" to each other. (*Id.*). Indeed, the Court specifically found that their relationship "could in no way be characterized as 'normal or stable'". (A-36). Even Respondent Miguel T. conceded below that, as late as five months after the child's birth and more than three months after the child's placement for adoption, there was no "intact" family. (Tr. B438).

That this Court's precedents could be construed to mandate the recognition of a veto right in these circumstances will have tragic implications, and not just in this case, and not just within the State of New York. The decision below compels a cruel choice for unwed mothers: abort the child during pregnancy, offer an

unwanted man a substantial role in her life, or unhappily keep an unwanted child. Adoptive parents are also placed in grave jeopardy: offer a loving home to an unwanted child but risk having the child wrenched away as the result of protracted litigation, over events not within their personal knowledge, and determined by nebulously subjective criteria. If adoptive parents willing to run such terrible risks cannot be found, children badly in need of stable, loving home environments will be at risk.

The decision of the Court of Appeals below, if allowed to stand unreviewed, will influence courts and legislatures in other states as to the proper construction and effect to be given this Court's prior precedents. This Court should not — and cannot — remain silent in the face of a decision which so violently mangles its prior precedents.

Nor should this Court remain silent in the face of an impeding tragedy. This Court may well be the last hope of a little baby and the adoptive parents whose only crime was to take in an unwanted child, love her, cherish her, and give her something that her birth parents never offered at the time — a home.

The Facts

This is an adoption proceeding involving an infant, known as Raquel Marie, who was born on May 26, 1988 (Tr. A17).[1] The child was born to Louise N. (Tr. A17) who was then 23 years old. (Tr. B760). Louise N. graduated from high school and intended to have a career as a dental technician (Tr. B760, 762).

The biological father of Raquel Marie is Miguel T. (Tr. A17). He was a mason construction laborer who claims to have earned some $4,000 in 1988, including $500 earned "off the books" working for his brother. (Tr. B 124). As of the time of the child's birth in May, 1988 and for the preceding year, the natural parents had

[1] References to "Tr. A" are to pages in the transcript for April 28, 1989. References to "Tr. B" are to pages in the transcript for May 1, 1989 and all ensuing trial days.

not lived together, except for one week. Indeed, the natural mother had secured *three* orders of protection from the criminal courts against Mr. T., as a result of his assaultive behavior.

Raquel Marie was surrendered by Ms. N. to the adoptive parents, Petitioners Robert and Ana C., on July 22, 1988. (Tr. A17). Mr. and Mrs. C. reside in Nashua, New Hampshire (Adoption Petition, verified January 6, 1989, Par. 1,3). Mrs. C. is a clinical social worker who earns $22,000 per year (*Id.*, Par. 2); Mr. C. is the president of his own business and earns $115,000 per year (*Id*, Par. 3).

On July 22, 1988, Ms. N. executed documents manifesting her intention and desire to consent to the adoption of Raquel Marie by Mr. and Mrs. C. (Petition, Par. 12 and Ex. B thereto). In the executed papers, Ms. N. acknowledged that she was placing the child for adoption because she recognized that she could not provide a good home for the baby and that the adoptive parents would provide "a fine home with a stable family environment which is something I could not provide a child at this time". (Petition, Ex. B). Raquel has continuously resided with Mr. and Mrs. C. since July 22, 1988.

In November 1988, Miguel T. and Louise N. reconciled and married each other. They then opposed the adoption petition filed by Mr. and Mrs. C. It should be noted, however, that shortly before the Court of Appeals' decision, Ms. N. separated from Mr. T. and filed proceedings against him, claiming that he had assaulted her on two occasions during the pendency of proceedings in the Court of Appeals.

Miguel T. and Louise N. met while they were high school students. (Tr. B4). They developed a sexual relationship (Tr. B5) and a child, Lauren, was born to them on August 10, 1986. (Tr. B15-16). Mr. T. claimed that, at this time, he and Ms. N. were living together "part time" at the home of Mr. T.'s parents. (Tr. B8). They discussed marriage; they each made marriage proposals to the other which were rebuffed. (Tr. B14, B247).

In September or October, 1986, Mr. T. and Ms. N. discussed sharing an apartment but never moved in together (Tr. B16, B17).

They were already in court on visitation and support disputes and by April 1987, Mr. T. was in default under a support order for Lauren. (Tr. B259-260).

In April 1987, Mr. T. and Ms. N. moved to an apartment together. (Tr. B18-19). However, that period of joint occupancy was short-lived. In May, 1987, Louise discovered that Miguel had been "cheating" with the next door neighbor; she argued with that neighbor and the neighbor's father; and the neighbor's father threatened to press criminal charges unless the parties moved out. (Tr. B20). In July of 1987, Louise left the apartment first and Mr. T. left the week after. (Tr. B21). This was the *only* period of time the parties lived together, during the five years they had known each other, with the exception of the one week which followed the birth of Raquel Marie.

In June or July 1987, Ms. N. become pregnant again. (Tr. B149). She, without telling Miguel, went to a doctor and had an abortion. (Tr. B149). This conduct angered him (Tr. B150). And he struck back.

On July 19, 1987, Appellant, who was living with his parents in Eastchester, went to Louise's parents home in Tuckahoe in the afternoon. (Tr. B157). When Ms. N. asked him to leave, he followed her into the house, demanded to talk to her, and then punched her in her left eye. (Tr. B158). She was hit so hard that she sustained a gash, was brought to the hospital emergency room, and was sutured. (Tr. B158). She received some three stitches. (Tr. B677). As a result of this incident, criminal charges were filed against Mr. T. and a court order of protection was issued to Ms. N. (Tr. B159).

Louise became pregnant again in September, 1987. (Tr. B556, 571-572). She told Fran McLaughlin, a member of the Westchester County District Attorney's Domestic Violence Unit, that she, (Ms. N.), had been raped by Mr. T. and that the pregnancy had resulted from this rape. (Tr. B688-689). She made the same statement to an Assistant District Attorney (B891), to a caseworker at Spence Chapin Agency (Ex. 14) and to her therapist (Ex. K). At trial, Ms. N. conceded that she had believed there was a relationship between the abortion in July 1987 and

the circumstances of her pregnancy in September 1987 ("it had something to do with what I had done previously") (Tr. B888), that prior conduct being an abortion (Tr. B890). Therapy records document the following (in July 1988): "Louise claims that her most recent pregnancy (Raquel) was the result of Michael forcing himself on her in retaliation for the abortion". The same records also reflect that Mr. T., according to Louise, "has used and dealt cocaine and that he smokes pot". The therapist noted that Louise believes that Mr. T. "has been with other women" and that, while he promises help with babies, he "flees" and does not pay attention to them. (Ex. K).

In addition, in June, 1988, Louise told Dee Dee Bouscaren of the Spence-Chapin Agency that Mr. T. had been "unreliable"; "physically and verbally abusive"; and has "made it known that he continues to be involved in other relationships". (Ex.14). In July, 1988, Louise told Ms. Bouscaren that, when she and Miguel were living together (i.e., in May, 1987) Miguel had been "unfaithful to her" and had "actually gave her pubic lice". (Ex. 14).

On Halloween 1987, Mr. T. pushed Ms. N. in the face while they were in a restaurant parking lot. (Tr. B706-707). She was angry at him because she wanted "to spend more time" with Mr. T. (Tr. B708). She recalled that she also assaulted him; that the incident was reported to the police; and that her lip was swollen. (Tr. B708).

On November 4, 1987, Mr. T. came to the home of Ms. N.'s parents (Tr. B630). At first, Mr. T. remained in his car outside beeping the horn. (Tr. B631). Later in the day, he returned and knocked on the door. He wanted to talk to Louise and he "just got upset" because she did not want to speak with him (Tr. B632). Ms. N. told the police in a written statement (Ex. I) that Miguel T. kicked in the front door and threatened harm to her if she brought "any other men into the house", and left. Ms. N. again filed criminal charges.

On January 19, 1988, Mr. T. again entered the home of Ms. N's parents, grabbed Ms. N. and left a mark on her neck. (Tr. B662-663). He did this in reaction to Ms. N.'s blaming him for

being with another woman. (Tr. B664). Ms. N. tried to call the police, but Miguel prevented her from doing so by grabbing the telephone from her hands. (Tr. B666). He then took the telephone and hit it into the wall. (Tr. B667-668).

On March 1, 1988, Mr. T. pled guilty to assault in the third degree and criminal mischief in the fourth degree in satisfaction of the six pending criminal charges brought against him by Ms. N. (Tr. B191-196; Ex. B). He was sentenced to three year's probation and to pay restitution. In addition, the Court granted Ms. N. a permanent order of protection.[2]

In March, 1988, Ms. N. and Lauren moved to an apartment in Mount Vernon, New York. (Tr. B557). She located this basement apartment through a real estate agent, without assistance from Mr. T. (Tr. B558-561). She paid the rent, security deposit, and broker's commissions from her own funds and with public assistance benefits. (Tr. B558-565).

Ms. N. did want Mr. T. to participate in any LaMaze classes with respect to Raquel's pregnancy (Tr. B293); his name did not appear on the birth certificate (Tr. B293); and his name nowhere appears in the voluminous hospital records. (Tr. B294-295).

After the birth of Raquel Marie, Ms. N. returned to her apartment. (Tr. B70). Raquel was retained in the hospital for a few extra days and, thereafter, she was brought to the apartment. (Tr. B70). Miguel T. contended that he lived at the apartment for "about one week" shortly after Louise returned home with the baby. (Tr. B85). However, during that week, they were arguing and Mr. T. believed that "it wasn't safe for me to stay there at night" (Tr. B85).

---

[2] These charges and convictions were not Miguel T.'s only contacts with the criminal courts. In addition to the criminal proceedings brought by Louise, there were the following: a theft of items from a drug store in September 1986 (Tr. B255); a charge of loitering at Eastchester High School in January, 1984, in which Mr. T. received an "ACD" disposition (adjourned in contemplation of dismissal) by *misrepresenting* his lack of prior arrests and convictions (Tr. B354-359); a July, 1983 conviction for trespassing at Leewood Country Club (the arrest was for burglary) (Tr. B 357-358); and then pending charges involving an assault on his brother's girlfriend. (Tr. B344-349).

On June 9, 1988, Miguel T. visited Ms. N. at her apartment; complained to her that she looked like "a slut and a whore"; that her clothes were "bimbo" clothes; and proceeded to pull her clothes off. (Tr. B205-206).

Later in June, 1988, Raquel was turned over to the Spence-Chapin Agency (Tr. B88). Ms. N. did this so that she could get a "break" (Tr. B99). She found it "hard" to deal with both children (B714), difficulty not assisted by the fact, as Miguel T. conceded, that there "were times where I wasn't there" (Br. Tr. B90). Louise did not want to allow him to take the baby to his parents because she was "insecure" and "was scared some other girl would take care of my baby" (Tr. B719). Moreover, she feared leaving Raquel with Mr. T. because of his "dogs". (Tr. B376).

The placement with Spence-Chapin occurred on June 23, 1988. (Tr. B305). However, prior to placement, Ms. N. decided to give Miguel T. another chance. On June 20, 1988, Louise came to his residence, dropped the children at the door, spit at Miguel, and told him to look after the children. (Tr. B386). Though Louise had no custody order, Miguel did not keep the children. His only concern was that Louise had an order of protection and he did not "want to get in any more trouble that [sic] he was already in." (Tr. B387-388). All of this occurred at a time when Miguel knew Raquel might be given up for adoption and Miguel was considering his avenues of legal redress. (Tr. B388).

Louise later testified that this incident was a test – one which Mr. T. failed. She dropped the children off that day because "if he wanted all the responsibility, then for him to take it". (Tr. B745). Ultimately, she retrieved the children, with the help of her mother (Tr. B745). Just three days later, she placed the child with Spence-Chapin.

Raquel Marie remained at Spence-Chapin for some 20 days. (Tr. B 305). Louise had advised Miguel that she was considering placing Raquel in foster care; he made no objection. (Tr. B304, 305). At no point during the 20 day stay of Raquel at Spence-Chapin did Miguel visit her or file any petition in any court as to her custody. (Tr. B306-307).

In July 1988, Louise went to the Spence Chapin Agency for an unannounced visit with Raquel. When the child could not be immediately produced, she formulated a desire to obtain the baby back. When the caseworker attempted to counsel her, she summoned Mr. T. Eventually, Raquel was relinquished to Ms. N.

Though Mr. T. contended that Ms. N. had frequently discussed a possible adoption for Raquel and that he told her that he would oppose it (Tr. B86-100), he claimed that there was "nothing" he could do until after the baby was born. (B99). Mr. T. and his attorney were aware of Ms. N.'s plans for adoption as early as January of 1988, five months prior to the child's birth (Exhibit 13 at p.5).

Mr. T. claimed to have been advised on July 12, 1988, by Louise that she just had a conversation with Ana C. concerning an adoption. (B429). His response was to walk out of the house. (Tr. B379). Even after learning that Louise was talking to specific people about an adoption, he did nothing for yet another week. (B429-432).

On July 19, 1988, Mr. T. filed a custody petition in Family Court - seeking custody of both Raquel and Lauren. (B101). However, he admittedly knew, as early as January, 1988, that Louise was considering adoption. (Tr. B96, B286). Notwithstanding that he knew Louise was considering adoption, notwithstanding that he knew of the Spence-Chapin placement in advance, he contended that he "was always kept in the dark" about adoption. (Tr. B303). But be that as it may, the baby was born on May 26, 1988, and he did nothing for two months (Tr. B380), even though he was well aware of Louise's plans to place the child for adoption. (Tr. B381).

The petition Miguel T. filed in Family Court on July 19, 1988 was a custody petition (B101), which made no reference to any adoption. Instead, his petition alleged that Louise was not "ABLE TO CARE FOR THE CHILDREN WHILE SHE IS WORKING OR IN SCHOOL." Ironically, Mr. T. claimed, in his petition, that he "CAN PROVIDE A STABLE HOME ENVIRONMENT.". (Petition of July 19, 1988). On July 22, 1988,

Louise executed the documents in reference to this adoption proceeding and delivered Raquel to petitioners.

Thereafter, Miguel and Louise received counseling from the Family Consultation Services. (B Tr.122-125). An order declaring Miguel T. to be the father of the child was made in August, 1989, in proceedings held without notice to petitioners. (A-35).

As late as October 1, 1988, there were still major incidents of violence between the parties, including an incident where Mr. T. pulled out clumps of Ms. N.'s hair (Tr. B213-214). The Eastchester Consultation Services records for this same period reflect that Louise believed that her decision to place Raquel for adoption was the "only way she could make a good life for herself and Lauren"; that Louise was "very needy" of therapy services; that Louise was abused by her father; and that the therapy was abruptly terminated. The Spence-Chapin case worker likewise reported that Louise was " in crisis", was overwhelmed by the prospect of raising two children alone and was frightened by Mr. T.

In September, 1988, Mr. T. brought a habeas corpus petition in Supreme Court, Westchester County in an effort to obtain custody of Raquel. (B433). At this late date, Ms. N. made no attempt to reclaim the child or to assist Mr. T. in his efforts. Indeed, he alleged that she had abandoned the child. Moreover, there was some evidence indicating that during this time Mr. T. obtained counselling for his propensity for violence at the Westchester Jewish Community Center. (B338). However, Mr. T. conceded that, despite this therapy, there were further incidents of violence. (Tr. B389).

Mr. T conceded that his marriage to Ms. N. was motivated at least in part by a desire to "help each other and get our child back" and to "start our lives as a family unit." (B414). Significantly, Mr. T. admitted that prior to November 1988, his family "wasn't an intact family". (Tr. B438).

It is undisputed that from July 22, 1988 to the time of the marriage in November, 1988, Ms. N. herself believed that the adoption was in Raquel's best interest and refused, despite several

opportunities and pressure, to join Mr. T. in opposing the adoption. Indeed, she told Spence-Chapin that she was "frightened with the prospect of raising two children on her own, and she is frightened by the BF [birth father] who is violent." (Ex. 14). Since Ms. N. did not desire the return of the child, this might result in turning over her child to Mr. T. — who, at that point in time had never been adjudicated her father; his only adjudications were as a criminal and as assaulter of women.

REASONS WHY WRIT SHOULD BE GRANTED

Specific Legal Issues to be Addressed

1. Based on its misperception of the prior decisions of this Court, the New York Court of Appeals has held that the State, as a condition for granting unwed fathers the right to veto an adoption, may not constitutionally insist that the father have participated in the formation of any sort of unitary or enduring family unit. Rather, it held that a liberty interest is to be recognized from the very existence of the biological connection by itself, even if that connection is never developed into any substantial, positive relationship with either the mother or the child. Moreover, the Court of Appeals held that the liberty interest of the father springs into being with the birth of the child and is to be viewed in isolation from the father's relationship with the mother. These views are in direct conflict with the prior precedents of this Court, and, in particular with the opinions of Justices Scalia and Stevens in *Michael H. v. Gerald D.*, ____ U.S. ____, 109 S.Ct. 2333 (1989). Even Justice Brennan, dissenting in *Michael H.*, agreed that a constitutionally protected liberty interest only when the father has developed "a substantial parent-child relationship". 109 S.Ct. at 2352.

2. The Justices of this Court in the separate opinions filed in *Michael H. v. Gerald D.* reflected profound disagreement as to the breadth of this Court's prior precedents governing the nature of the liberty interest that may be asserted by nonmarital fathers. While *Michael H.* was not an adoption case, the division of the Court as to the proper construction of its prior precedents has caused state courts, and legislatures, to disagree

as to appropriate standards for measuring the rights of unwed fathers in the adoption context. At root are fundamental policy questions. Here, the Appellate Division, implicitly following the approach taken by Justice Scalia's plurality opinion, upheld the statute as providing proper criteria for measuring the presence of a protected family relationship. The Court of Appeals read the very same cases to mean that the unwed father has an liberty interest, flowing from the biological connection, which is independent from any familial relationship. This Court has a responsibility to resolve these fundamental differences, particularly since, without further clarification, state courts and legislatures will be left adrift on an uncharted sea.

3. The present case, unlike any previously considered by this Court, involves a statute specifically designed to deal with consent rights of unwed fathers to the adoption of newborn infants — those placed for adoption when less than six months of age. In *Caban v. Mohammed*, 441 U.S. 380 (1979), this Court specifically left open whether the special difficulties attendant to newborns would permit the State to impose more stringent requirements upon unwed fathers seeking automatic veto rights. The Court of Appeals below has construed this Court's prior precedents as requiring that unwed fathers be afforded an opportunity to develop a relationship with the child, even if the mother, for valid reasons, wishes to place the child for adoption at, or shortly after, birth. The result of the holding below will be to encourage unwed mothers, burdened by brutal relationships with men, to abort pregnancies. The conferral of a broad veto power, unchecked by any consideration for the best interests of the child, upon unwed fathers creates a powerful weapon for causing further injury to victimized women. An unwed mother considering adoption or abortion is not likely to choose adoption if those plans can be easily disrupted by a father who has made no commitment to the mother during pregnancy. She is not likely, in short, to choose adoption if conflict with an unwanted (and violent) man is the price to be paid for choosing life for the baby.

4. Respondent Miguel T., pursuant to Section 111-a of the Domestic Relations Law, was notified of this adoption and has

been afforded the opportunity to participate in the proceedings. Specifically, he has participated in a evidentiary hearing concerning, among other things, whether the adoption of Raquel Marie would be in her best interests. That hearing commenced after the Appellate Division's order of September 11, 1989 and was suspended without date upon the decision of the Court of Appeals to take jurisdiction of the case. The Court of Appeals determined that, in all instances where an unwed father manifests sufficient interest in the child, the unwed father may insist upon an absolute veto right. Such an absolute right exalts the rights of the unwed father over the rights of the child. This Court has never held that an absolute right must always be conferred upon an unwed father once he is found to have a liberty interest in the child. Indeed, Justice Stevens, in his separate opinion in *Michael H.*, expressed the view that the constitutional rights of unwed fathers may be sufficiently respected by a statutory scheme which affords him the opportunity to make a plea based upon the child's best interests. That New York unquestionably does.

ARGUMENT

POINT I

THE COHABITATION REQUIREMENT OF DOMESTIC RELATIONS LAW SECTION 111 IS CONSTITUTIONAL

Domestic Relations Law §111 (subd. 1 [e]) was enacted in order to address the concerns of this Court in *Caban v. Mohammed*, 441 U.S. 380 (1979). In drafting the statute, the Legislature drew meaning, not only from *Caban*, but from *Matter of Malpica Orsini*, 36 N.Y.2d 568, 577, 370 N.Y.S.2d 511, 520 (1975), *appeal dismissed*, 423 U.S. 1042 (1977), decided a few years before. Mr. Caban was found to have a liberty interest sufficient to entitle him to veto the proposed adoption where he had been identified as the father on the children's birth certificate, had actually lived with the children for *over five years*, and had paid support. For all intents and purposes, there was an intact family unit which would have been disrupted by the adoption.

In contrast to the facts presented in *Caban*, this Court found no constitutional impediment to denying an automatic veto to the unwed father in *Malpica Orsini*, who, though he lived with the mother for nearly two years, was seriously in default in support payments, was given to "violent rages", tore a telephone off the wall on two occasions, ripped the wires out of the mother's car and threatened to take the child and disappear.

The distinction drawn in §111 (1) between children placed for adoption, before or after, six months of age was directly drawn from the decision in *Malpica Orsini*. There, as this Court noted in *Caban*, it was recognized that, where young infants are involved, it is often impossible to locate unwed fathers, whereas mothers are more likely to remain with their children. 441 U.S. at 392. In *Caban*, the Court responded to this suggestion by commenting that the "special difficulties attendant upon locating and identifying unwed fathers at birth" could justify a legislative distinction between mothers and fathers of newborns. *Id.* Manifestly, a father who has resided with the pregnant mother is similarly situated with the mother: both are readily found, both are likely to remain with their children. An unwed father who resides with the pregnant mother is similarly situated to a wedded father: both are readily found, both are likely to remain with their children.

The enactment of §111 (1) (e) not only accommodated the constitutional rights of unwed fathers but also promoted adoption and protected the rights of adoptive children and adoptive families to have their futures decided expeditiously and finally. See *New York State Council on Children and Families* statement in support of S-9768 at 2 (June 25, 1980); *New York State Department of Social Services* statement in support of S-9768 at 2 (June 20, 1980); *Legal Aid Society* statement in support of S-9768 at 2 (July 2, 1980).

> This bill establishes a uniform standard which will aid the Court, social service districts and authorized agencies in determining whether consent from the father is required prior to the adoption of a child born out of wedlock. This, in turn, should both promote

> consideration of adoption by prospective adoptive families, and help assure stability of the adoptive home when an adoption does occur. *New York State Department of Social Services* statement in support of S-9768 at 2 (June 20, 1980).

Absent enforcement of the objective criteria adopted by statute, the confusion generated by *Caban* will be revived. Natural mothers, adoptive parents, and adoption agencies will be left with uncertainty as to how individual judges would respond to individual cases if the statute is regarded as merely a flexible measuring point, malleable with each judge depending upon the particular circumstances of each case and the particular viewpoints of each judge. That is exactly what the Legislature sought to avoid. The statute provides readily ascertainable standards, necessary so that the parties can structure their lives.

A firm standard is needed to protect the natural mother and adoptive parents, as well as the child, from the uncertainties inherent in a flexible, unpredictable standard. Indeed, since many children under six months old are placed for adoption at, or shortly after, birth, it is impossible to wait and see if the unwed father elects to pursue a substantial, positive relationship with the child. In order to do so, the unwed mother would be saddled, as here, with a child that she could not properly care for, which she could not financially support, and which she did not want.

As was explained in *Matter of Robin U.*, 106 Misc.2d 828, 435 N.Y.S.2d 659, 662 (Family Ct. Orange County 1981):

> "there are pragmatic differences between the relationship of an unwed father with a newborn or very young child and the relationship of an unwed father with an older child. The unwed father of a newborn or very young child does not have the opportunity to establish an ongoing relationship with the child through substantial and continuous or repeated contact so that the quality of his relationship with the child's mother, his public acknowledgment of his fatherhood and his

> acceptance of financial responsibility for the newborn child's birth must be used as indicia of his parental concern."

Where a child is placed after six months of age, both parents will have had an opportunity to establish a home, or at least meaningful contact, with the child. As to a unborn child, placed shortly after birth, it is obviously impossible, as *Robin U.* notes, for the father to maintain contact with the unborn. The way he establishes his connection is by maintaining a positive relationship with the mother. Indeed, as Justice Scalia made explicit in *Michael H.*, the presence of constitutional rights is dependent upon the presence of an family relationship. The New York courts have consistently viewed §111 (subd. 1 [e]) as a test for what Justice Scalia refers to as "a protected family unit" (109 S.Ct. at 2342) or what Justice Stevens terms "an enduring 'family' relationship" (109 S.Ct. at 2347).

For example, in *Matter of Female D.*, 83 A.D.2d 933, 442 N.Y.S.2d 575 (2nd Dept. 1981), the Court stated that the consent of a non-marital father of a child born out-of-wedlock is not required:

> where the father has failed to satisfy such legislatively prescribed criteria as are intended to demonstrate that the newborn infant has a functioning male parent (and, therefore, a *de facto* family) available to him or her. Thus, where the unwed father is available to the child through his presence and his financial support (see Domestic Relations Law, §111, subd. 1, par. [e]), the father is afforded a voice regarding the adoption of the infant and his consent is required. Where, however, the unmarried father does not meet these criteria, the adoption may go forward merely upon the consent of the mother. 442 N.Y.S.2d at 578.

Female D. rejected the view that the statute was unconstitutional. The Court stated that "the foregoing statutory scheme effectively promotes the adoption of illegitimate newborns into

stable adoptive families. The statute requires the consent of *both* parents where a *de facto* family unit has been created through the efforts of the natural father but, at the same time, precludes an absentee biological father from frustrating the attempts at adoption undertaken by the natural mother in the perceived best interests of the child where she is the only parent available to it." 442 N.Y.S.2d at 578.

The Court of Appeals below misread the five major precedents of this Court. Indeed, it is clear that this Court has never detected a liberty interest in the circumstance presented here — an unwed father who was not part of a viable, unitary, intact family.

Thus, in *Stanley v. Illinois*, 405 U.S. 645 (1972), the unwed father lived with the mother and children and supported them for 18 years. By having participated in raising the children for such a lengthy period, the unwed father developed a powerful interest in those children, meriting constitutional protection. As Justice Scalia wrote in *Michael H.*, *Stanley* rests upon the "historic respect — indeed sanctity would not be too strong a term — traditionally accorded to relationships that develop within the unitary family". 109 S.Ct. at 2342.

The second major pronouncement of this Court came in *Quilloin v. Walcott*, 434 U.S. 246 (1978) where no rights were found because the unwed father never established a home with the unwed mother and never had custody of the child. Notably, in *Quilloin*, this Court emphasized that the unwed father had been afforded notice of the adoption and had been afforded an individualized hearing as to his interests in the child, including the opportunity to offer best interests evidence. 434 U.S. at 253-254.

Quite strangely, the Court of Appeals below detected in *Quilloin* the notion that the rights of unwed fathers are to be afforded lesser protection where a stepfather has shouldered the parental role left open by the biological father — a factor the Court of Appeals said would not apply where the adoptive parents are "strangers to the children". (A-12). Such a holding is untenable. Why should the rights of the unwed father turn

on whether the mother has invited another man to supplant the unwed father in her life, as distinguished from her surrendering the child outright? Indeed, the Court of Appeals inconsistently held that it is improper to focus upon the father/mother relationship. Moreover, an approach based on whether a stepparent seeks adoption was, expressly rejected in *Lehr v. Robertson*, 463 U.S. 248. (1983). There this Court explicitly stated, in footnote 19, that, while *Lehr*, like *Quilloin*, happened to involve an adoption by the husband of the natural mother, there was no reason to believe the natural father has any greater right to object to such an adoption than to an adoption by two total strangers.

Moreover, the fact remains that Miguel T. had left open the parental role; that was precisely why Louise N., after affording Miguel T. ample opportunity, elected to proceed with adoption. It is utterly offensive to term Robert and Ana C. "strangers" to Raquel Marie; if anyone is a stranger to her, it is Miguel T. During the two months of her life that passed prior to placement, Miguel was so uninvolved as to be the motivating factor in Louise's decision to pursue adoption. It was Robert and Ana C. who shouldered the parental role left open by both biological parents. Indeed, by the time of the filing of the adoption petition in January 1989, Miguel's writ of habeas corpus had been dismissed and Raquel Marie had been living with Mr. and Mrs. C. for over half a year. As in *Quilloin*, the purpose behind the unwed father's objection to adoption was to frustrate an effort to "give full recognition to a family unit already in existence". 434 U.S. at 255-256. In *Quilloin*, the natural father, despite many visits to the child, gifts to the child, and legally obligated support to the child, was denied a right to object to adoption because of his failure to offer the child a committed relationship paralleling the stability and security of the family unit, circumstances very much like those present herein.

The third major precedent, *Caban v. Mohammed*, 441 U.S. 380, *supra*, likewise involved a situation where the unwed father lived with the unwed mother and the children for a substantial period of time (more than five years) and supported them. *Caban* held that it is an impermissible gender-based discrimination to deny unwed fathers the right to veto an adoption where

they have established a parental relationship as substantial as that of the unwed mother. 441 U.S. at 386-387. In the case of newborns, it is a biological fact that the father cannot have the same level of commitment to the fetus as the mother. It is, after all, the mother who carries the child. For the father to establish a relationship with the fetus, he must have a commitment to the mother. By living with the mother, the father lives with the fetus.

The Court of Appeals below also drew upon this Court's decision in *Lehr v. Robertson*, 463 U.S. 248 (1983), which upheld, as against constitutional challenge the notice provisions of New York Domestic Relations Law, §111-a. However, there this Court, expressly reinforcing the notion that it is the family unit which must be the focus, rejected a claim by the unwed father that it was unconstitutional to deny him notice where he was not listed on the birth certificate, did not live with mother or child after birth, and did not provide support.

Notably, this Court in *Lehr* commented on the viability of the entire New York statutory program: citing to both §111 (as to veto rights) and §111-a (as to notice). This Court had little difficulty concluding that New York's procedures were constitutional, as designed to promote the best interests of the child, protect the rights of interested third parties, and ensure promptness and finality. It is strange, indeed, that a decision of this Court upholding one part of a unitary statutory scheme should be read as supporting the invalidation of another part of that same scheme.

Just as mangled by the Court of Appeals was the determination in *Michael H. v. Gerald D.*, U.S. , 109 S.Ct. 2333 (1989). There, it was determined that a biological father had no constitutional right to seek a declaration of paternity as to a child born to the wife of another man. Yet, if one read only the opinion of the Court of Appeals below, one would conclude that the biological father had prevailed in this Court, when he had not. Ignored completely was Justice Scalia's analysis of the precedents — an analysis in keeping with the statutory concept at issue here. Justice Scalia wrote that whether the father of an out-of-wedlock child has constitutionally protected interest in that child

depends upon whether the father has had such a relationship with the mother as to give rise to "a protected family unit under the historic practices of our society". 109 S.Ct. at 2342. The father was denied any right to claim paternity, though he lived with the mother during a three-month period and stayed over with the mother and the child periodically during an eight month period.

Justice Scalia rejected the notion that biological fatherhood plus an established paternal relationship yields constitutional rights, 109 S.Ct. at 2342, an equation that Miguel T. seeks to sustain here. Rather, as Justice Scalia put it, the rationale of the Court's prior caselaw is based on the historic respect "traditionally accorded to the relationships that develop within the unitary family". *Id.* As a result, the issue is "whether the relationship between persons in the situation of [Miguel] and [Louise] has been treated as a protected family unit under the historic practices of our society. . . ." *Id.*[3]

Justice Scalia's analysis was concurred in by three other Justices. Justice Stevens, in his separate concurrence, agreed that the key is the presence of "enduring 'family' relationships". Moreover, Justice Stevens concluded that, at best, the unwed father's rights were limited to participation in a best interests hearing on visitation. 109 S.Ct. at 2347.

Manifestly, the evidence shows affirmatively that Mr. T. and Ms. N. had not formed any "unitary" family whose relationships are entitled to historic respect: not in light of the evidence that the parties would not live together, would not marry each other, were violent toward each other, had romantic relationships with others, and spent much of their time litigating various court criminal and civil proceedings. Mr. T. testified that, as

---

[3] This statement rejects the claim of Appellant that his rights cannot be measured by his relationship with Ms. N. Indeed, in a statement remarkably applicable here, Justice Scalia rejected the claim that the father's rights are determined only by the relationship to the child since, to do so, could lead to the conclusion that a rapist could gain paternal rights. 109 S.Ct. at 2342 n.4.

of November 1988 (a period five months after the child's birth and three months after the child's placement for adoption), there was no "intact" family. (B438).

The requirements of §111 (1) (e) were carefully drawn to promote compelling state interests.

First, the State has a clear responsibility in facilitating and expediting adoptions of out of wedlock children. Second, the State has legitimate concerns in promoting prenatal care of infants and their mothers. Third, the State, as *parens patriae*, has an interest in the well being of adoptive children and their prospective adoptive families. The State has an interest in preventing "a wide range of prospective placements and adoptions" from being discouraged because prospective adoptive parents would fear being drawn into "an excursion into relative values difficult of proof". *Matter of Malpica Orsini, supra*, 36 N.Y.2d at 576, 370 N.Y.S.2d at 519. The Legislature has an valid interest in enacting statutes which will prevent "controversy and uncertainty" from overhanging adoptions. *Matter of Sarah K.*, 66 N.Y.2d 223, 242, 496 N.Y.S.2d 384, 394 (1985) (Kaye, J.), *cert. denied*, 475 U.S. 1108 (1985).

Most important, the State has a compelling interest in preserving the integrity of a woman's fundamental right to choose whether or not to bear a child. *In re Baby Girl S.*, 628 S.W.2d 261, 264 (Tex. Ct. of Cir. App. 1982). Under *Roe v. Wade*, 410 U.S. 113 (1973), a woman has the right to decide whether or not to go through with her pregnancy. That right may not be abrogated by the father of the child. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). In order to make a clear-headed decision about pregnancy, it is essential that the threat of future contravention of her decision to place the child for adoption (instead of aborting the fetus) not loom over her head.

The President's Task Force on Adoption has reported that abortion is the principal barrier to adoption, with teenage mothers involved in nearly one-third of the over 1.5 million abortions in 1982. While adoption is clearly an alternative to abortion, that choice is not viable where the possibility looms that

a father may fit within uncertain, fluid criteria and thereby unexpectedly upset the mother's well-considered plan by withholding consent. While adoption may be a positive solution that meets the needs of the parties, the result may be the coerced abortion by the mother to avoid a problematic situation created by uncertainty as to the father's "rights". An unwed mother considering adoption or abortion is not likely to choose adoption if conflict with the father is the price she may pay for choosing life for the baby.

To grant an unwed father a veto power over adoption, in the absence of a demonstrated commitment to the mother and child would unnecessarily delay, complicate and impede the adoption process. Unwed mothers would choose less desirable alternatives in order to avoid or circumvent the adoption system; they would settle for premature or undesired parenting; more babies would be aborted, placed in indefinite foster care, or illegally marketed. The social costs and personal tragedy would increase.

§111 (1) (e) protects against legitimate risks — it prevents complication of the adoption process, threatens to the privacy interests of unwed mothers, the creation of unnecessary controversy and litigation, the unnecessary delay of adoptions, and impairing the finality of adoption decrees. As this Court has noted, many unwed fathers withhold adoption consent solely to harass the mother, by forcing her to keep the baby against her will or to maintain contact and coerce marriage with the mother*, and that mothers, faced with uncertainty regarding the finality of adoption or with the possibility that the father may obtain custody, will simply keep their babies. *Caban v. Mohammed*, 441 U.S. 380, 407 n. 13 (1979). To classify a biological father as a parent entitled to veto an adoption, merely by taking vague steps gives him a "powerful club" to substantially reduce the options open to the mother. *In the Interest of T.E.T.*, 603 S.W. 2d 793, 797 (Texas 1980).

---

* This threat may have come to pass herein. The evidence adduced below suggests that pressure was, indeed, put on Ms. N. It is not entirely coincidental that the marriage came only after Miguel T. was defeated in his attempt to obtain custody on his own.

There are powerful policy reasons supporting the New York Legislature's decision to provide "a reasonable, unambiguous and objective standard". See 1980 N.Y. Leg. Annual, pp. 242-243. It had every right — and every obligation — to do so. The New York Court of Appeals should not have invoked the federal constitution to defeat the salutary purpose of the legislation.

POINT II

EVEN ASSUMING *ARGUENDO* THAT MIGUEL T. HAS ANY LIBERTY INTEREST, THAT INTEREST WAS FULLY PROTECTED BY GIVING HIM NOTICE OF THE PROCEEDING AND THE OPPORTUNITY TO PARTICIPATE AT THE BEST INTERESTS HEARING

Pursuant to Dom. Rel. L. §111-a, Miguel T. was afforded notice of the adoption proceeding and the opportunity to be heard on the issue of best interests. In fact, Appellant, through his counsel, has fully participated in every day of the hearing that had commenced following remand by the Appellate Division.

Even assuming *arguendo* that Miguel T. has shown sufficient indicia of interest in the child to be entitled to some constitutional protection, that should not mean that he was thereby entitled to a declaration that the entire statutory scheme is unconstitutional and that he may veto the adoption. As Justice Stevens suggested in his concurring opinion in *Michael H.*, *supra*, the constitutional right may be limited to the right to try to convince the trial court that blocking the adoption would be in the child's best interests. See 109 S.Ct. at 2347; see also *Quilloin v. Walcott*, 434 U.S. 246 (1978). Indisputably, New York law affords him that opportunity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: White Plains, New York
October 8, 1990

Respectfully submitted,

ALAN D. SCHEINKMAN
Counsel of Record for Petitioners
3 Barker Avenue
White Plains, New York 10601
(914) 686-9310

RONALD J. BAVERO
FINK, WEINBERGER, P.C.
Co-Counsel for Petitioners
11 Martine Avenue
White Plains, New York 10601
(914) 682-7700

APPENDIX

Remittur

Court of Appeals
State of New York

The Hon. Sol Wachtler, Chief Judge, Presiding

2 No. 133

In the Matter of Raquel Marie X.
(Anonymous)

Mr. and Mrs. C. (Anonymous),
Respondents,

Mr. T. (Anonymous),
Appellant,

Mrs. T. (Anonymous),
Respondent.

The appellant(s) in the above entitled appeal appeared by Domenick J. Porco, Esq.; *the respondent(s) appeared by* Fink Weinberger Fredman Berman Lowell & Fensterheim, P.C., Alan D. Scheinkman, Esq., and Richard S. Birnbaum, Esq.; and law guardian appeared by Richard J. Strassfield, Esq.

The Court, after due deliberation, orders and adjudges that the order is reversed with costs, and matter remitted to the Appellate Division, Second Department, for further proceedings in accordance with the opinion herein. Opinion by Judge Kaye. Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock and Bellacosa concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Appellate Division, Second Department, *there to be proceeded upon according to law.*

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ Donald M. Sheraw

Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, July 10, 1990

State of New York
Court of Appeals

2 No. 133

In the Matter of Raquel Marie X. (Anonymous).

Mr. and Mrs. C. (Anonymous),
Respondents,

Mr. T. (Anonymous),
Appellant,

Mrs. T. (Anonymous),
Respondent.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

1 No. 134

In the Matter of Baby Girl S.

Adoptive Parents,
Appellants,

v.

Natural Father et al.,
Respondents.

(133) Domenick J. Porco, Scarsdale, for appellant.
Richard S. Birnbaum, White Plains, for respondent Mrs. T.
Alan D. Scheinkman, Ronald J. Bavero, White Plains, for respondents Mr. and Mrs. C.
Richard J. Strassfield, Eastchester, law guardian.

(134) Alan D. Scheinkman, White Plains, for appellants.
George A. Terzian, Mary A. Clarke, NY City, for respondent mother.
Joseph T. Gatti, NY City, for respondent father.
Kevin C. Fogarty, Neponsit, law guardian.

KAYE, J:

The focus of these appeals, involving the adoption of newborn infants, is Domestic Relations Law § 111(1), which provides that — while an unwed mother's consent is always required — an unwed father's consent to the adoption of his under-six-month-old child is required only where he has openly lived with the child or the mother for six continuous months immediately preceding the child's placement for adoption, openly

acknowledged his paternity during such period, and paid reasonable pregnancy and birth expenses in accordance with his means (Domestic Relations Law § 111[1][e]). We conclude that the statutory requirement that the father openly live *with the mother* before the child's placement for adoption neither legitimately furthers the State's interest nor sufficiently protects that father's, and that 111(1)(e) must therefore be declared unconstitutional.

While the facts in both cases have been developed at length elsewhere (*see, Matter of Raquel Marie X.*, 150 AD2d 23; *Matter of Baby Girl S., published in part at* 141 Misc 2d 905, *affd without opn* 150 AD2d 993), only a few are pertinent to the present analysis.

Both cases are adoption proceedings involving out-of-wedlock children whose birth mothers executed consents to their adoption. The putative adoptive parents were strangers to the children. In each case the child is a girl now just two years old—Baby Girl S. was born on April 24, 1988, Raquel Marie on May 26, 1988. Baby Girl S. was placed for adoption by her mother on April 27, 1988, two days after her birth; Raquel Marie on July 22, 1988, two months after her birth. In each case, the biological parents did not live together for any sustained period of time prior to the child's placement. However, after the initial estrangement during which each unwed mother sought adoption for the child—thus implicating the lives of hopeful adoptive parents—the biological parents reunited and the mother thereafter supported the father's efforts to gain custody of the child. No question of fitness or abandonment is in issue.

In *Raquel Marie*, on November 4, 1988, approximately three months after the child was placed for adoption, the biological parents—Louise and Miguel—were married, but they do not have custody of the child, who has lived virtually her entire life with her adoptive parents in New Hampshire. The trial court, after a hearing limited to the issue of the need for Miguel's consent under Domestic Relations Law § 111(1)(e), concluded that while Louise and Miguel lived separately in the relevant six-month period before placement—during which he several times assaulted her—they had a sufficiently continuous and ongoing relationship to meet the "living together" requirement of the statute, loosely construed; the court additionally found that, in

the key six-month period, Miguel had openly held himself out as the child's father and contributed to the pregnancy and birth expenses, thus entitling him to veto the adoption.

The Appellate Division took a different view of the couple's tumultuous relationship in the six months preceding placement, concluding that it was "neither normal nor stable." (150 AD2d at 26.) In that Miguel failed to satisfy the "living together" requirement of the statute, the Appellate Division determined that he had no right to veto the adoption. While the court explicitly premised its holding Miguel's failure to meet the "living together" requirement, it additionally observed that there was little evidence of Miguel's compliance with the remaining two requirements of Domestic Relations Law § 111(1)(e), or of any effort on his part to manifest substantial parental responsibility. Miguel's appeal is before us as a matter of right, on a constitutional question (CPLR 5601[b]).

In *Baby Girl S.*, while the biological parents (Regina and Gustavo) also did not live together in the relevant six-month period preceding the child's placement, the affirmed findings of the Surrogate established a course of conduct over several months that prevented Gustavo from even knowing of the pregnancy or his paternity, thus rendering literal compliance with the statute impossible. The Surrogate, unanimously affirmed by the Appellate Division, concluded that the adoption should fail both because of fraud of the adoptive parents during the proceeding and because – reading a "savings clause" into the statute for prevention by others – Gustavo did as much as possible to fulfill the statutory requirements and therefore was entitled to veto the adoption. The Surrogate on November 15, 1988, ordered the child transferred from the adoptive parents to Gustavo, with whom she has since remained. After the Appellate Division affirmance, we granted the prospective adoptive parents' motion for leave to appeal.

Concluding that the "living together" prong of Domestic Relations Law § 111(1)(e) renders the statute unconstitutional, we now reverse the Appellate Division order in *Raquel Marie*; in *Baby Girl S.*, we affirm on the statutory ground and affirmed

findings of Gustavo's substantial parental interest, without reaching the question of fraud on the part of the adoptive parents.[1]

The New York Statute Against the Backdrop of Five Supreme Court Cases[2]

Assessment of the New York statute and the parties' claims regarding its validity can only be undertaken in the context of the five Supreme Court cases that have shaped the constitutional contours of the unwed father-child relationship.

The evolution of the case law, and corresponding amendments of the New York statute, are themselves a commentary on changing family patterns and social attitudes toward unwed fathers (*see generally*, Note, *Certainly Not Child's Play: A Serious Game of the Hide and Seek with the Rights of Unwed Fathers*, 40 Syracuse L Rev 1055 [1989]; Raab, *Lehr v Robertson: Unwed Fathers and Adoption – How Much Process is Due?*, 7 Harv Women's LJ 265 [1984]; Note, *Caban v Mohammed: Extending the Rights of Unwed Fathers*, 46 Bklyn L Rev 95 [1979]; Note,

---

[1] While the issue is not necessary to our disposition in this case, we cannot overlook the extensive affirmed findings of fraud on the court. Fraud on a court is intolerable in any proceeding; it is particularly so in adoption proceedings where misrepresentations may be calculated to circumvent statutory notice provisions and cut off constitutionally protected interests (*see, e.g.*, Domestic Relations Law § 111 [3][b]; *Bennett v Jeffreys*, 40 NY2d 543, 549).

[2] Before considering the constitutionality of the statute, we reject Miguel's contention that his marriage to Louise on November 4, 1988 – some five months after Raquel Marie's birth and three months after her placement for adoption – alone requires his consent to the adoption, pursuant to Domestic Relations Law § 24(1), which legitimates a child born out of wedlock when the parents subsequently marry. In this respect we agree with the Appellate Division that the consent of the father is *automatically* required only for the adoption "of a child conceived or born in wedlock" (*see* Domestic Relations Law § 24[1]). Acceptance of Miguel's argument would otherwise render that provision meaningless, and introduce a new uncertainty into every adoption; unwed parents could marry at any point before an adoption became final and thereby acquire an absolute veto (*see*, 150 AD2d, at 30). Miguel's alternative contention that the marriage fortifies his constitutional argument is dealt with at page 409, *infra*.

The Unwed Father's Rights in Adoption Proceedings: A Case Study and Legislative Critique, 40 Alb L Rev 543 [1976]; Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 Mich L Rev 1581 [1972]).

Until the 1970's, unwed fathers had no legally recognized interest. That point is amply illustrated by the 1972 Supreme Court decision in *Stanley v Illinois* (405 US 645), where children born during a nonmarital cohabitation that spanned 18 years, under Illinois law became wards of the State upon their mother's death.

Stanley established that a father's interest "in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection" (*id.* at 651); the sense of the parental tie as a fundamental interest appears throughout the Court's opinions in this area. Illinois' blanket assumption that all unwed fathers were unfit was found to have violated both equal protection and due process, which entitled Stanley to a hearing on his fitness as a parent before the State could terminate his parental rights. The Supreme Court rejected the State's claim that unmarried fathers could reasonably be presumed unqualified to raise their children, and recognized that a father in Stanley's situation had a constitutional interest in his relationship with his nonmarital children entitled to the same protection against State interference as the interest of other custodial parents.

Following *Stanley*, the New York Legislature in 1976 added Domestic Relations Law § 111-a, for the first time requiring that an unwed father in enumerated circumstances be given notice of an adoption proceeding, which would then entitle him to present evidence relevant to the best interests of the child (L 1976, ch 665). Still an unwed father in New York had no right to veto an adoption to which the mother had consented.

In 1978, relying on *Stanley*, Leon Quilloin sought the right to veto the adoption of his 11-year-old child by the boy's stepfather. While Quilloin's name appeared on the birth certificate, he never had custody, or regularly supported or visited the child, nor did he attempt to legitimate him until receiving notice of

the proposed adoption. Rejecting Quilloin's equal protection and due process claims, the Supreme Court identified the issue, unresolved by *Stanley*, as one of the *degree of protection* a state must afford "the rights of an unwed father in a situation, such as that presented here, in which the countervailing interests are more substantial." (*Quilloin v. Walcott*, 434 US 246, 248).

Noting its long recognition that the relationship between parent and child is a constitutionally protected one, the Court stated that it had little doubt that the Due Process Clause would be offended if the State were to attempt to break up a biological family over the objection of parents and children solely in the perceived best interests of the children. However, it found no violation in view of Quilloin's failure to have or seek custody of his son, where the result of the adoption would be to give legal recognition to an existing family unit. The nature of Quilloin's actual relationship with his son was also central to the Court's rejection of his equal protection claim. The Court emphasized that he "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child" (*id.* at 256) – a responsbility that a once-married father would have exercised during marriage – and the absence of such a relationship justified differential treatment.

Stanley involved an unwed father with actual custody of his children at the time the State attempted to terminate his parental rights, *Quilloin* an unwed father who had never had custody. *Caban v. Mohammed* (441 US 380) – decided in 1979, just one year after *Quilloin* – concerned an unwed father who for several years, but no longer, had custody of his children. Under the New York law then in effect, he was entitled only to notice of the proposed adoption and an opportunity to present evidence on the children's best interests.

A sharply divided Supreme Court struck down the New York statute on equal protection grounds, applying the intermediate level of scrutiny applicable to gender-based distinctions and concluding that the "undifferentiated distinction between unwed mothers and unwed fathers, applicable in all circumstances where adoption of a child of theirs is at issue, does not bear a

substantial relationship to the State's asserted interests." (*Id.* at 394.) Since Caban and his children had lived together as a family for several years, the "case demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother." (441 US, at 389.) While agreeing the State had important interests in furthering the adoption of nonmarital children into "a normal, two-parent home" (*id.* at 391), the majority concluded that gender-based distinction of § 111 was too broad to be substantially related to this interest.

According to the State, a requirement of the consent of unwed fathers would impede the adoption process because they are often impossible to locate, whereas mothers tend to remain with their children. Specifically reserving the question whether such difficulties would justify different treatment concerning newborn adoptions, the majority found that in the case of older children, the State's problem could be solved by a more finely-drawn distinction, as in "cases where the father has never come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child." (*Id.* at 392.)

In an effort to bring New York's statute into compliance with *Caban*, the Legislature in 1980 amended Domestic Relations Law § 111 (L 1980, ch 575; *see*, Sponsor's Mem, 1980 New York State Legis Ann 242-243). Rejecting proposals to require the consent of all unwed fathers, the Legislature opted to provide them with a veto right only in specified circumstances which in its view objectively and unambiguously manifested that, through his efforts, here was a substantial, continuous, meaningful family relationship available to the child. Recognizing distinction between the adoption of newborns and older children, the Legislature set up one test for an unwed father's veto right in the case of an under-six-month child (Domestic Law § 111[1][e]) and a different test for an over-six-month child – requiring financial support, visitation and communication with the child (Domestic Relations Law § 111[1][d]). No exception is made in 111(1)(e) – as in 111(1)(d) – for prevention of the father's efforts

to satisfy statutory requirements by the person having custody of the child. That is essentially the statute before us today.

Twice since *Caban* the Supreme court has considered questions relating to the unwed father-child relationship, although Domestic Relations Law § 111(1)(e) was not in issue in either case. In 1982, in *Lehr v Robertson* (463 US 248), the Court sustained New York's notice statute — Domestic Relations Law § 111-a — in a case where the unwed father, seeking to block the stepfather's adoption, had never during the child's two years lived with her or the mother or provided financial support.

In *Lehr*, which rested solely on procedural due process grounds, the Court in defining the father's liberty interest characterized "the rights of the parents [as] a counterpart of the responsibilities they have assumed" (*id.* at 57), and emphasized that the Court's recognition of such rights had been, for the most part, in the context of a recognized family unit. Analysis of the previous three cases demonstrated the distinction between a mere biological connection and an actual relationship of parental responsibility. Commenting on the biological link, the Court stated that its significance was "that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development." (*Id.* at 262.) As Lehr had never grasped the opportunity to form a relationship with his daughter, the due process issue was whether New York had given adequate procedural protection to his opportunity to do so, and the Court concluded that it had.

As for Lehr's equal protection claim, again emphasizing that "the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child" (*id.* at 266-267), the Court held that the New York statutes did not operate to deny Lehr equal protection, because he (like Quilloin)

had never established a substantial relationship with his child, and hence (unlike Caban) was not similarly situated with the child's mother.

Finally, only last term in *Michael H. v Gerald D.* (491 US ____, 109 S Ct 2333) the Supreme Court considered the constitutionality of the California statutory scheme governing the rights of a biological father of a child born to a woman married to and living with another man at the time of conception. While the efforts of the alleged biological father to gain visitation were denied, five Justices, in concurrence and dissent, indicated that such a father might have a constitutionally protected liberty interest in his relationship with the child when the mother was married to another man at the time of birth. Even the author of the two-Justice plurality opinion noted that the Court had previously assumed in *Lehr* that the Constitution might require that some protection be accorded the biological father's opportunity to develop a relationship with the child, and left open the question whether there would be a different result if the marital parents did not wish to raise the child as their own. The four dissenters found that Michael H. had fully met the Court's test for constitutional protection — he not only had a biological connection but also had come forward to participate in the child's rearing and shown a willingness to assume his parental responsibilities.

Thus, it is plain that within two decades the interest of unwed fathers in a relationship with their children has gained significant recognition in the law, and the dimensions of that interest are by now well defined. The protected interest is not established simply by biology. The unwed father's protected interest requires both a biological connection and full parental responsibility; he must both be a father and behave like one (*see*, Bartlett, *Re-Expressing Parenthood*, 98 Yale LJ 293 [1988]). When an unwed father promptly commits himself to custody—signifying "provision for the physical and emotional needs of children, provision of guidance and direction to children, and living with children on a day-to-day basis" (Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v Robertson*, 45 Ohio St LJ 313, 350 [1984])—in adoption proceedings by

strangers he is entitled to the constitutional due process and equal protection guarantees accorded other parents before his rights are terminated.

The Unwed Father's Constitutional Interest In the Case of Newborns

In the case of a child placed for adoption at birth, the father can have no more than a biological connection to the child, there having been no chance for a custodial relationship. Protection of his parental interest would depend, then, upon recognition of a constitutional right to the opportunity to develop a qualifying relationship with the infant.

That open question is before us today: is the full measure of constitutional protection – the right to a continued parental relationship absent a finding of unfitness – ever required where a child is placed for adoption before any real relationship can exist, and if so, what actions on the unwed father's part would demonstrate his willingness to take parental responsibility sufficient to give rise to such rights? We conclude that such an interest must be recognized in appropriate circumstances, and we do so as a matter of Federal constitutional law; the parties' exclusive reliance on Federal law affords us no basis for considering the issue under our own State Constitution.

In *Caban*, involving an unwed father who did not have a current custodial relationship with his children, the Court gave determinative significance to the fact that he nonetheless had demonstrated a continuing willingness to have such a relationship. Conversely, in *Lehr* and *Quilloin*, rejecting the fathers' claims that their relationships were also worthy of the maximum protection, the Court emphasized their failure to grasp such opportunities for a significant relationship as had been available. Thus, it is apparent that the biological parental interest can be lost entirely, or greatly diminished in constitutional significance, by failure to timely exercise it or by failure to take the available legal steps to substantiate it.

Consequently, in an adoption proceeding by strangers, an unwed father who has been physically unable to have a full custodial relationship with his newborn child is also entitled to the maximum protection of his relationship, so long as he promptly avails himself of all the possible mechanisms for forming a legal and emotional bond with his child (*see*, Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v Robertson*, 45 Ohio St LJ 313; see also, In re Adoption of B.G.S., 556 So 2d 545 [La 1990]; *In re Baby Girl Eason*, 257 Ga 292, 358 SE2d 459 [1987]). In *Lehr* in fact, Justice Stevens spoke of "the opportunity" the biological link offers the unwed father to develop an interest entitled to full constitutional protection (*Lehr v Robertson*, 463 US at 262, *supra*). This implies, however, that in order to have the benefit of the maximum protection of the relationship—the right to consent to or veto an adoption—the biological father not only must assert his interest promptly (bearing in mind the child's need for early permanence and stability) but also must manifest his ability and willingness to assume custody of the child (*see*, Buchanan, Op. cit., 45 Ohio St LJ at 362-368; *see also*, Note, *Certainly Not Child's Play: A Serious Game of Hide and Seek with the Rights of Unwed Fathers*, 40 Syracuse L Rev 1055, 1079-1084 [1989]).

Notably, in *Lehr* and *Quilloin*, the Supreme Court also emphasized that the result of permitting stepfather adoptions would be legal recognition of a *de facto* family already in existence, a State interest it viewed as outweighing the parental interests of the fathers who had not grasped the opportunity to solidify their relationships with their children. This State interest in recognizing the legal rights of a stepfather who *has* shouldered the parental role left open by the biological father's failure to do so, is not present in the cases before us, involving proposed adoption by parties who were strangers to the children.

This is not to say that the unwed father's failure to form ties with his newborn child may not be sufficiently great to constitute a sort of waiver or abandonment that would give rise to a State interest in providing the child with a permanent, stable home through adoption, as well as an interest on the part of prospective adoptive parents who have committed themselves

to the child. The unwed father's right is decidedly limited in duration. Nonetheless, a father who has promptly taken every available avenue to demonstrate that he is willing and able to enter into the fullest possible relationship with his under-six-month-old child should have an equally fully protected interest in preventing termination of the relationship by strangers, even if he has not as yet actually been able to form that relationship.

The Relation Between the State Interest and the Private Interest

Where a fundamental interest of this nature is at issue, any legislation limiting or burdening it at the very least must meet two tests: the statute must further a powerful countervailing State interest, and there must be a close fit between the governmental objective sought and the means chosen to achieve it. These standards would apply whether the analysis were undertaken as a matter of due process or equal protection (*see, Caban v Mohammed*, 441 US 380, *supra* [equal protection]; *Stanley v Illinois*, 405 US 645, *supra* [equal protection and due process]; *see also, Matter of Malpica-Orsini*, 36 NY2d 568, *and especially* 578 [Jones, J. dissenting], *app dsmd sub nom. Orsini v Blasi*, 423 US 1042).

Unquestionably, substantial State interests are at stake in the adoption laws generally, and the consent provisions particularly (*see, Matter of Malpica-Orsini, supra; see also*, McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 Ga L Rev 977 [1988]). The distinctions drawn in Domestic Relations Law § 111[1]), based on parents' gender and children's age, reflect the inherently different position, alluded to by Justice Stevens in his *Caban* dissent, of an unwed mother alone faced with the enormous responsibility of making crucial decisions about the future of her newborn child. As the child grows older, the urgency underlying certain of those decisions arguably diminishes, and at that point there may be less justification for requiring the biological father's participation rather than allowing him to fulfill his responsibilities through financial support and occasional visitation or communication, as contemplated by Domestic Relations Law § 111(1)(d). Moreover, as

Justice Stevens further noted, available statistics strongly indicate that infants are more likely to be adopted and more readily bond with adoptive parents. To the extent that the State has an interest in encouraging the adoption of these children, the statute promotes that end by limiting the necessity for paternal consent, thus making the process surer and speedier.

While the State cannot deny all unwed fathers who have never lived with their newborn children the right to veto adoption, plainly it can do a great deal to promote its own substantial interests, as well as the integrity of the adoption process. The State can deny a right of consent to all unwed fathers who do not come forward to immediately assume their parental responsibilities, and it can prescribe conditions for determining whether the unwed father's manifestation of interest in his child is sufficiently prompt and substantial to require full constitutional protection (*see, generally*, Note, *Unwed Fathers and the Adoption Process*, 22 Wm & Mary L Rev 85, 135-137 [1980]).

Domestic Relations Law § 111(1)(e) attempted to do precisely that. Indeed, the Legislature rejected an alternative proposal by the Law Revision Commission which envisioned according courts discretion to dispense with the unwed parent's consent where, in the court's opinion, the "parent has not manifested a significant parental interest in the child and is not prepared to assume the obligations of parenthood." (*1980 Report of NY Law Rev Commn, Recommendation to Legislature Relating to the Rights of Fathers in the Adoption of Children Born Out of Wedlock*, 1980 McKinney's Session Laws of New York, 1672, 1673-1674.) Instead, the Legislature chose the current requirements, which the bill's sponsor opined "follow the Supreme Court's opinion which accords protection to fathers who 'participated in the rearing' of the child, who *** had 'manifested a significant paternal interest in the child,' " and that the bill would be a "reasonable, unambiguous and objective standard to guide agencies and courts." (Sponsor's Mem, 1980 NY Legis Ann. at 243.)

The desire to fashion reasonable, unambiguous and objective standards is surely understandable in these matters of high

sensitivity. But given that unwed fathers who grasp the opportunity to shoulder the responsibilities of parenthood are entitled to as much protection of their rights in adoption proceedings as other parents, the "living together" requirement of Domestic Relations Law § 111(1)(e) – which cuts off their interest by imposing as an absolute condition an obligation only tangentially related to the parental relationship – cannot stand.

Where the State interest is in determining the existence of a significant parental concern for a relationship with the child, the difficulty with the "living together" requirement stems from its focus on the relationship between father and mother, rather than father and child. When the child is surrendered for adoption by the mother at birth – as in the case of *Baby Girl S.* – under Domestic Relations Law § 111(1)(e) the father can qualify for a veto right only if he has continuously lived with the mother for a full six months preceding the birth – in which case it seems unlikely that there would even be a conflict between father and mother on the question of adoption. Even if a father theoretically could qualify by living only with the child during a portion of the period prior to placement, by definition the statute in every instance requires some period of living with the mother, which does not establish parental responsibility toward the child.

The "living together" requirement can easily be used to block the father's rights. But even more significantly, it permits adoption despite the father's prompt objection even when he wishes to form or actually has attempted to form a relationship with the infant that would satisfy the State as substantial, continuous and meaningful by any other standard.

Nor does the "living together" requirement sufficiently further the State interest. The other two requirements of Domestic Relations Law § 111(1)(e) – public acknowledgement of paternity within the six month period preceding placement, and payment of pregnancy and birth expenses – already ensure that the father is both identifiable and, to some extent, ready to support the child financially. At any rate, the "living together" requirement adds nothing to either of those important considerations. Although the State plainly has a significant interest in

fostering the well-being of the child by ensuring swift, permanent placement (*see*, Note, *Lehr v Robertson: Putting the Genie Back in the Bottle: The Supreme Court Limits the Scope of the Putative Father's Right to Notice, Hearing and Consent in the Adoption of his Illegitimate Child*, 15 U Tol L Rev 1501, 1550-1553 [1984]), the State's objective cannot be constitutionally accomplished at the sacrifice of the father's protected interest by imposing a test so incidentally related to the *father-child* relationship as this one, directed as it is principally to the *father-mother* relationship.

Finally, the adoptive parents argue that the requirement promotes a strong State interest in assuring that the child has "stable" family relationships, presumably meaning a two-parent family. While the requirement might at first blush appear to promote that result between the biological parents, any connection between that objective and the means chosen to promote it disappears with the realization that the issue arises only when, over the father's objection, the mother has surrendered the newborn infant and consented to adoption. Moreover, it is hardly obvious that the State has a sufficiently strong interest in ensuring that children are raised in a two-parent family to defeat the biological father's right to a parental relationship. Indeed, since the State permits adoption by a single adult (Domestic Relations Law § 110), this argument also fails.

Accordingly, the "living together" requirement specified in Domestic Relations Law § 111(1)(e) renders the statute unconstitutional as there is an insufficient fit with any valid State interest.

The remaining two statutory requirements are in a sense overlapping, since an acknowledged father under Family Court Act § 514 is already required to pay certain pregnancy and birth expenses. Although Domestic Relations Law § 111(1)(e) is challenged only as to the "living together" requirement, we know with certainty from the format of the existing statute as well as the contemporaneous expressions of intent that the Legislature would not have wished to have the unchallenged portions of

the statute stand alone as the sole measure of an unwed father's commitment to the child, entitling him to veto an adoption. Therefore, while mindful of the extraordinary significance of so doing, we have no recourse but to declare § 111(1)(e) unconstitutional in its entirety.

We recognize from a mere statement of the problem, from the considerable commentary on the subject, and from the wide array of approaches taken by other states—which do not impose our "living together" requirements[3] — that it is no easy task to formulate unambiguous standards that both encapsulate the qualifying relationship and protect all of the important interests involved. Nonetheless, that effort is required.

---

[3] Illinois, for example requires that the father have lived with the *child* for at least half the length of its life prior to placement (with no reference to living with the mother) unless prevented from doing so (Ill Ann Stat, ch 40 ¶ 1510 § 8[a][3]), and South Carolina has requirements similar to Domestic Relations Law § 111(1)(e), but in the disjunctive (SC Code Annot., § 20-7-1690[5]). In Maine, a putative father named in the birth record, or currently providing or attempting to provide support, or involved in or attempting to be involved in a family relationship with the child, upon notice must petition for custody of the child. If the court finds that paternity has been established, and that the father is willing and able to take custody, he has the right to consent to the adoption (Me Rev Stat Ann at Tit 19 § 532-C.). Other states require that the unwed father have established paternity prior to the adoption proceeding (*see, e.g.*, Ark Code Ann at § 9-9-206[a][2]; Burns Indiana Stat Ann at § 31-3-1-6[a][2]), or even simply require consent of both biological parents (*see* 2A Ariz Rev Stat Ann § 8-106). A number of states have granted veto rights to unwed fathers on condition that they file a notice of paternity and intent to support the child within specified time limits—which may be as short as five days—provided they have not otherwise abandoned the child (*see, e.g.*, Utah Code Ann at § 78-30-4; Neb Rev Stat § 43-104.02).

Strict construction of the cited statutes has generally been upheld against constitutional challenge, although in several cases involving the affirmative thwarting of the father's efforts to pursue his parental rights, they have been held unconstitutional as applied (*see, In re Application of S.R.S. and M.B.S.*, 225 Neb 759, 408 NW 2d 272 [1987]); *Wells v Children's Aid Soc'y*, 681 P 2d 199 [Utah 1984]; and *Ellis v Social Servs. Dept. of Church of Jesus Christ of Latter Day Saints*, 615 P2d 1250 [Utah 1980]; *see also*, 1990 Utah Laws Ch 245 [revised statute allows father to assert interest upon proof of impossibility of timely filing]).

Application of the Law to the Facts

Establishing a proper substitute is of course the prerogative of the Legislature, not the courts. Until there is new legislation, however, it will be necessary for courts to resolve cases before them – including the two present appeals. In setting forth criteria that are to be considered by courts needing in this interim period to determine whether an unwed father has established the requisite interest for a right of consent, we underscore that we are not prescribing necessary or even appropriate elements for any new statute, or speculating as to its constitutionality.

While the Legislature might ultimately adopt different criteria, in this period courts will be guided by principles gleaned from the Supreme Court decisions, which define an unwed father's right to a continued parental relationship by his manifestation of parental responsibility. In the case of newborn infants, we take this to mean that the qualifying interest of an unwed father requires a willingness himself to assume full custody of the child – not merely to block adoption by others. In this connection, any unfitness, or waiver or abandonment on the part of the father would be considered by the courts, as they would whenever custody is in issue (*see, Bennett v Jeffreys*, 40 NY2d 543).

An assertion of custody is not all that is required. The Supreme Court's definition of an unwed father's qualifying interest recognizes as well the importance to the child, the State and all concerned that, to be sufficient, the manifestation of parental responsibility must be prompt. In reaching this determination, courts should give due weight to the remaining portions of Domestic Relations Law § 111(1)(e), which were directed to that same objective and are unchallenged in this litigation. Perhaps most significantly they establish the period in which the father's manifestation of responsibility for the child is to be assessed – the six continuing months immediately preceding the child's placement for adoption. The interim judicial evaluation of the unwed father's conduct in this key period may include such considerations as his public acknowledgement of paternity, payment

of pregnancy and birth expenses, steps taken to establish legal responsibility for the child, and other factors evincing a commitment to the child.

Applying such considerations leads us to affirm the Appellate Division order in *Baby Girl S.*, where there are extensive affirmed findings supported by the record to sustain the unanimous conclusion reached by the courts that Gustavo, the biological father himself seeking full custodial responsibility virtually from the time he learned of Regina's pregnancy, did everything possible to manifest and establish his parental responsibility. The Surrogate recited Gustavo's persistent and uniformly rebuffed expressions of concern, offers of support and requests for custody, as well as his legal efforts to establish paternity and secure custody – within the six months preceding the infant's placement – concluding from the evidence that he was "a concerned father" (141 Misc 2d at 915), that he "obviously did all he could have done under the circumstances" (*id.* at 916), and that "Gustavo's concern for his child is, at the very least, as substantial and significant as Mr. Caban's concern for his children." (*Id.*, at 917.)

Though Miguel also wishes to assume custody, we cannot conclude in *Raquel Marie* that in the key six-month period he established his parental responsibility, and the matter must be remitted to the Appellate Division for further review of the facts. Having held that Miguel failed to satisfy the "living together" prong of 111(1)(e), the Appellate Division stated that it did not need to go any further in its factual review, observing only that "little evidence of compliance with [the remaining two statutory] requirements was adduced by the natural father in this case." (*Id.* at 29.) Thus, while the trial court was satisfied that Miguel had manifested parental responsibility sufficient for a veto over the child's adoption, the Appellate Division explicitly did not complete a review of the facts necessary to that determination.

Nor is the need for further review obviated by the fact of the marriage, as Miguel contends. Marriage obviously may be considered as one factor in determining whether the father has

manifested the requisite parental responsibility, but the marriage must be timely in order to be considered substantial. It is surely not impermissible for the State, in order to protect children and prospective adoptive parents from heartbreak and uncertainty, to impose as a requirement for the automatic right of consent to adoption of a newborn infant that any marriage take place by the time the child is born (Domestic Relations Law § 24[1]).

Accordingly, in *Raquel Marie* the Appellate Division order should be reversed, with costs, and the matter remitted to the Appellate Division for further proceedings in accordance with this Opinion, and in *Baby Girl S.* the Appellate Division order should be affirmed, with costs.

* * * * * * * * * * * * * * * * * *

Case No. 133: Order reversed, with costs, and matter remitted to the Appellate Division, Second Department, for further proceedings in accordance with the opinion herein. Opinion by Judge Kaye. Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock and Bellacosa concur.

Case No. 134: Order affirmed, with costs. Opinion by Judge Kaye. Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock and Bellacosa concur.

Decided July 10, 1990

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

2926w
J/hu

Argued - June 27, 1989

AD2d

LAWRENCE J. BRACKEN, J.P.
JOSEPH J. KUNZEMAN
THOMAS R. SULLIVAN
VINCENT R. BALLETTA, JR., JJ.

2459E

In the Matter of Raquel Marie X. Anonymous). Mr. and Mrs. C. (Anonymous), appellants; Mr. and Mrs. T. (Anonymous), respondents.

OPINION & ORDER

Appeal in an adoption proceeding by the proposed adoptive parents, from so much of an order of the Family Court, Westchester County (Louis A. Barone, J.), entered May 10, 1989, as denied their petition for adoption of the infant Raquel Marie.

Alan D. Scheinkman, White Plains, N.Y., and Fink, Weinberger, Fredman, Berman, Lowell & Fensterheim, P.C., White Plains, N.Y. (Alan D. Scheinkman and Ronald J. Bavero of counsel), for appellants.

Domenick J. Porco, Scarsdale, N.Y., for respondent Mr. T.

Richard S. Birnbaurn, White Plains, N.Y., for respondent Mrs. T.

Richard J. Strassfield, Eastchester, N.Y., law guardian on behalf of the child.

Robert Abrams, Attorney-General, New York, N.Y. (Robert J. Schack of counsel), in his statutory capacity under Executive Law § 71.

PER CURIAM.

In this appeal from the denial of an adoption petition, we are confronted with the question of whether the consent of the natural father to the proposed adoption of the infant child Raquel Marie is required pursuant to Domestic Relations Law § 111(1)(e). Based upon the following discussion, we conclude that it is not.

Raquel Marie's natural parents first met in 1983 or 1984 while both were attending high school. A tumultuous relationship followed. On August 10, 1986, the natural mother gave birth to a daughter, Lauren Louise. Shortly thereafter, the unmarried couple began to discuss the idea of living together, inasmuch as they were residing in the homes of their respective parents at the time. However, they did not begin to cohabit until mid or late April 1987, when they and Lauren took up residence in an apartment. The cohabitation was short-lived, for in late May 1987 certain rumors arose concerning the purported infidelity of the natural father, prompting the natural mother to vacate the premises and return to her parents' home with Lauren. The natural father likewise returned to the home of his parents, and the couple continued to see each other sporadically. In the summer of 1987 the natural mother procured an abortion without telling the natural father. This action greatly angered the natural father. In October 1987 the couple learned that the natural mother was again pregnant. Their relationship deteriorated, and the natural mother obtained an order of support due to the natural father's failure to properly provide for Lauren, as well as numerous orders of protection necessitated by the violent

conduct of the natural father. The natural mother also accused the natural father of raping her and, due to his repeated assaults on her person and his violation of orders of protection, filed at least three separate criminal complaints against him.

Raquel Marie, the child who is the subject of the instant adoption proceeding, was born on May 26, 1988. Her birth certificate did not set forth the name of her natural father. Her natural parents remained unmarried and were not cohabiting at the time of her birth. For approximately one week after the child's birth, the natural father "was spending the nights" with the natural mother at an apartment in which she had taken up residence. However, as the natural father conceded at the hearing, he did not continue this practice because "we were arguing, and I thought it wasn't safe to stay there at night".

When Raquel Marie was approximately one-month old, the natural mother placed her with the Spence-Chapin Agency for adoption, claiming that she was unable to care for two children. At the natural father's insistence, the child was retrieved from the agency. However, on July 22, 1988, the natural mother executed a consent to adoption and surrendered Raquel Marie to an attorney. The attorney then gave the child to the proposed adoptive parents, with whom the child has resided ever since. On July 19, 1988, the natural father had commenced a custody proceeding against the natural mother. An order of filiation was entered upon his consent on August 19, 1988. Although the natural parents had discussed marriage on numerous occasions in the past, they did not marry until November 4, 1988, and the natural mother then joined in the natural father's attempt to obtain custody of Raquel Marie. The proposed adoptive parents then commenced this proceeding in January 1989 to finalize the adoption. The natural parents opposed the petition and sought the return of the child, essentially contending that the natural father's consent to the adoption was required and had not been obtained, and that the consent of the natural mother to the adoption was invalid. The Family Court, Westchester County directed that a hearing be held to resolve the dispute. The court bifurcated the hearing, limiting the

evidence solely to the issue of whether the natural father's consent to the adoption was necessary.

At the conclusion of the hearing, the Family Court rendered a decision which accurately characterized the natural parents' relationship as one which was turbulent, marred by mutual suspicion as well as assaultive behavior on the natural father's part, and neither normal nor stable. However, the court concluded that the natural father had sufficiently met the requirements of Domestic Relations Law § 111(1)(e) and therefore, his consent to the adoption was necessary. Inasmuch as such consent was never obtained, the court denied the petition for adoption. We now reverse.

At one time, an unwed father in New York had no right to veto an adoption to which the biological mother had consented. In *Caban v Mohammed* (441 US 380), the United States Supreme Court declared the predecessor statute of Domestic Relations Law § 111 unconstitutional insofar as it created a gender-based distinction violative of the Equal Protection Clause by requiring only the consent of the mother for an adoption. In response to *Caban v Mohammed (supra)*, the New York State Legislature amended Domestic Relations Law § 111 in 1980, thereby granting unmarried fathers certain veto rights with regard to adoptions in particularized circumstances and when certain conditions have been met. The legislative history underlying the amendment demonstrates that the criteria set forth in Domestic Relations Law § 111(1)(e), which are applicable herein, are to be considered mandatory rather than permissive (*see*, 1980 N.Y. Legis Ann, at 242). Accordingly, with respect to children who are born out of wedlock and placed for adoption less than six months after birth, Domestic Relations Law § 111(1)(e) provides as follows: ***

> "Subject to the limitations hereinafter set forth consent to adoption shall be required as follows: ***
>
> "(e) Of the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time he is placed for adoption, but only if:

> (i) such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and (ii) such father openly held himself out to be the father of such child during such period; and (iii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child."

The foregoing provision serves the salutary purpose of ensuring that the consent of an unmarried father to an adoption will be required where a meaningful family relationship has been established. Conversely, as we noted in *Matter of "Female" D.* (83 AD2d 933, 935):

> "the preadoption consent of the unwed father of an infant under the age of six months is not required where the father has failed to satisfy such legislatively prescribed criteria as are intended to demonstrate that the newborn infant has a functioning male parent (and, therefore, a *de facto* family) available to him or her".

Indeed, the statutory requirements of Domestic Relations Law § 111(1)(e) are not to be taken lightly, for:

> "[t]he Legislature has determined * * * that an unwed father must show that he has offered at least minimal support to the mother and child and created some semblance of a family unit before his consent will be required for the adoption of an infant placed for adoption before the age of six months. Where an unwed father has failed to provide this stability and support, *as evidenced by compliance with the requisite statutory criteria*, it is in the interests of the infant, of the society in which the infant will live, and of the unwed mother, if she consents, to have the child adopted into a home where such stability and support will be provided" (*Matter of Michael Patrick C.*, 83 AD2d 932, 933 [emphasis supplied]).

Put another way, "[the] statute *** only requires the consent of those fathers of children born out of wedlock who have established a substantial relationship with the child" (*Matter of Catholic Child Care Socy. [Danny R.]*, 112 AD2d 1039, 1041).

With respect to the present case, we initially reject the natural parents' suggestion that Domestic Relations Law § 111(1)(e) is constitutionally flawed. We have previously upheld this provision as constitutional in *Matter of "Female" D, (supra)* and *Matter of Michael Patrick C. (supra)*. Indeed, in *Matter of "Female" D (supra*, at 935), we elaborated on the constitutionality issue as follows:

> "where the unwed father is available to the child through his presence and his financial support (see Domestic Relations Law, § 111, subd 1, par [e]), the father is afforded a voice regarding the adoption of the infant and his consent is required. Where, however, the unmarried father does not meet these criteria, the adoption may go forward merely upon the consent of the mother. In our view, the foregoing statutory scheme effectively promotes the adoption of illegitimate newborns into stable adoptive families. The statute requires the consent of ***both*** parents where a ***de facto*** family unit has been created through the efforts of the natural father but, at the same time, precludes an absentee biological father from frustrating the attempts at adoption undertaken by the natural mother in the perceived best interests of the child where she is the only parent available to it. Thus, the statute 'serve[s] important governmental objectives and [is] *** substantially related to [the] achievement of those objectives' (*Califano v Webster*, 430 US 313, 316-317, quoting *Craig v Boren*, 429 US 190, 197). It therefore satisfies the constitutional test for a gender-based classification".

Inasmuch as Domestic Relations Law § 111(1)(e) provides logical, objective and eminently sound indicia by which to determine

whether an unmarried father has manifested the intent to establish a substantial familial relationship with an infant born out of wedlock, we discern no basis for departing from the above-expressed view.

Turning to the facts of the instant case, we conclude, contrary to the findings of the Family Court, that the natural father has fallen far short of demonstrating that he took meaningful steps to establish a family unit. Our analysis of his compliance with Domestic Relations Law § 111(1)(e) need not extend beyond the first statutory criterion (*i.e.*, the requirement that he openly live with the child or the child's mother for a continuous period of six months immediately preceding the child's placement for adoption). Indeed, as conceded by the natural father's attorney at the hearing before the Family Court, there was no such cohabitation during the six-months period prior to Raquel Marie's placement except for a one-week interval following the child's birth. Moreover, the biological father's contact with the biological mother during the entire six-month period was sporadic and often culminated in violent and abusive behavior. Additionally, while it is unnecessary for us to consider the criteria set forth in Domestic Relations Law § 111(1)(e)(ii) and (iii), regarding public acknowledgment of paternity and acceptance of the financial responsibilities which accompany fatherhood, we note that little evidence of compliance with these requirements was adduced by the natural father in this case. Accordingly, we need not presently decide the issue of whether and under what circumstances something less than 100% compliance with the criteria set forth in Domestic Relations Law § 111(1)(e) may satisfy the statute and require an unmarried father's consent to an adoption. The record overwhelmingly demonstrates that, even under a relaxed interpretation of the statute, the natural father's efforts to establish a substantial family relationship in this case were woefully inadequate.

We further note that the reliance of both the natural father and the Family Court upon the decision in *Matter of Baby Girl S.* (141 Misc 2d 905, *affd without opinion* 150 AD2d 993 is misplaced. In that case, an adoption proceeding was dismissed

on the ground of fraud and misrepresentation. No similar issue is presently before us. While the decision in *Matter of Baby Girl S. (supra)* went on to state that the requirement of strict compliance with the criteria set forth in Domestic Relations Law § 111(1)(e) would work an unconstitutional result where the natural mother rebuffed the natural father's repeated efforts to establish a substantial family relationship, that discussion constituted mere dicta. Moreover, the First Department's affirmance without opinion of the Surrogate Court's decision and order in that case does not constitute appellate authority for the analysis set forth therein. Most significantly, there is simply no persuasive evidence in the record before us to demonstrate that the natural father in this case made every effort to establish a substantial family relationship, or that any such purported efforts were thwarted by improper behavior on the part of the natural mother. While the natural mother may have exhibited some reluctance to see the natural father on certain isolated occasions, such reluctance is hardly surprising given his domineering, violent and assaultive conduct. Moreover, he failed to demonstrate any genuine effort to overcome her reluctance (*see generally, Matter of Emily Ann*, 137 Misc 2d 726). Hence, inasmuch as he has failed to fulfill the statutory criteria, we conclude that the natural father's consent to the proposed adoption of Raquel Marie is unnecessary (*see, e.g, Matter of "Female" D., supra; Matter of Michael Patrick C., supra).*

Only one other contention of the natural parents merits brief mention. They maintain that their marriage on November 4, 1988, more than five months subsequent to Raquel Marie's birth and more than three months after her placement for adoption, operates retroactively so as to require the biological father's consent to the proposed adoption. This contention is without merit. While the marriage of the parents of a child born out of wedlock serves to legitimatize the child (*see* Domestic Relations Law 24[1]), it is nevertheless clear that the consent of the father is automatically required only for the adoption "of a child conceived or born in wedlock" (Domestic Relations law § 111[1b]). Where, as in the instant case, the adoptive child is neither conceived nor born in wedlock, the consent of the father will be

required only, if he can satisfy the criteria set forth in Domestic Relations Law § 111(1)(d) or (e). Acceptance of the natural parents' present contention would render these latter statutory provisions meaningless and would create uncertainty in adoption proceedings by permitting unwed parents to marry at any point prior to an adoption being finalized and thereby acquire the power to veto the proposed adoption. Such a result is untenable in light of the clear statutory language. Accordingly the petition for adoption was improperly denied on the ground that the consent of the natural father was required

Finally, we note that the Family Court inprovidently exercised its discretion in ordering a bifurcated hearing to determine whether the natural father's consent to the adoption was required, before receiving evidence on the question of the validity of the natural mother's consent, which was also in issue. Under the facts and circumstances of this case we believe that it should be remitted to another Judge of the Family Court for a prompt hearing regarding the validity of the natural mother's consent to the adoption and resolution of any remaining issues.

BRACKEN. J.P.. KUNZEMAN. SULLIVAN and BALLETTA, JJ., concur.

ORDERED that the order is reversed insofar as appealed from, on the law, and the matter is remitted to the Family Court, Westchester County, for further proceedings on the petition for adoption in accordance herewith, before a different Judge.

ENTER:

Martin H. Brownstein
Clerk

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
----------X

In the Matter of the Adoption of a Child Whose First Name is RAQUEL MARIE.

DECISION AND ORDER

Docket No. A-4-89

----------X

HON. LOUIS A. BARONE:

There is presented to the Court a most distressing and heart-rendering proceeding. Adoption proceedings usually bring with them an aura of joy and fulfillment. At bar, we have five lives at bay.

The Petitioners, Robert and Ana C., seek to finalize the adoption of the child Raquel Marie. This proceeding is contested by the biological parents Louise N. T. and Miguel T. Louise T. alleges that her consent and surrender of the child were fraudulently obtained and further, that she revoked said surrender and the child should be returned to her.

The Respondent, Miguel T., alleges that his consent as the father of he child is required and refuses to give said consent. The Petitioners contend that Respondent, Miguel T., does not comply with Domestic Relations Law Section 111(1)(e) and therefore the adoption may proceed.

The prevailing section provides "(1) subject to the limitations hereinafter set forth consent, to adoption shall be required as follows:

(e) of the father, whether adult or infant of a child born out-of-wedlock who is under the age of six months at the time he/she is placed for adoption, but *only if*:

(i) such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and

(ii) such father openly hold himself out to be the father of such child during such period; and

(iii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child." (emphasis added).

At the outset of the proceedings, the attorney for Miguel T. conceded that in the event the Court literally interpreted Domestic Relations Law Section 111(1)(e), his client failed to comply with that provision requiring the father to have lived openly with the mother or the child "for a continuous period of six months immediately proceeding the placement of the child for adoption."

The Law Guardian had suggested that the Court consider a bifurcated proceeding. Only the issue of the father's consent would be heard, because a decision thereon could be dispositive of the entire proceeding. If the Court found the father's consent was required, adoption proceeding would fall and the child would be returned to the biological parents. If the father's consent was not required, the Court would then proceed to issue the mother's consent, and depending on the determination made therein the adoption would be granted or denied.

All counsel and parties agreed to proceed solely on the issue of the father's consent. The Court further ruled that evidence could be presented to show "de facto" compliance with that portion of the statute that required the parties to live together. The Court would consider testimony and evidence of all acts and events, which if viewed "in toto" would indicate compliance.

Several other "housekeeping" rulings were consented to prior to the commencement of the proceedings. The adoptive parents and the child reside in New Hampshire. The biological parents are residents of New York. All parties agreed to submit to the jurisdiction of the New York Courts and to waive any objection to the matter being heard and determined by this Court.

All parties further agreed to permit a newspaper reporter present during the proceedings with the understanding that any printed report of the proceeding would not reveal the last names of the natural or adoptive parents or the subject child.

It was further agreed, that Respondent, Miguel T., had the burden of "going" forward to prove compliance with the statute.

Certain issues of fact have been conceded by all parties:

1. Louise N. T. and Miguel T. are the biological parents of the child Raquel Marie.

2. At the time of the child's birth Louise N. and Miguel T. were not married.

3. The child Raquel Marie was born on May 26, 1988.

4. Louise N. and Miguel T. while unmarried, were the biological parents of a child Lauren born August 10, 1986.

5. Raquel Marie was placed with the adoptive parents Robert and Ana C. on July 22, 1988.

6. Louise N. and Miguel T. were subsequently married on November 4, 1988.

The Respondent, Miguel T., then proceeded to submit his evidence as to each element of the statute.

Miguel T. (hereinafter referred to as Michael T.) testified that he and Louise had an off again/on again relationship for several years. They met in high school and dated during 1984 and 1985. In the Fall of 1985, Louise became pregnant with the child Lauren. During this pregnancy, Louise sometimes lived at his parents' home and at her parents' home. They took Lamaze classes together to prepare for the baby, he drove her to the hospital on her due date and was present during the actual birth of the child. Lauren was born on August 10, 1986. He testified that they discussed marriage but Louise stated she didn't trust him enough to marry him. In her direct testimony, Louise N. confirmed Michael's statements.

In the Spring of 1987, Louise, Michael and Lauren moved into an apartment at 84 Dunwoodie Street in Scarsdale, New York. The three lived together until Louise moved out in or about August, 1987. At that point she went to live with her parents and he lived with his parents.

In October, 1987 Louise was complaining of back pains. Michael testified he made arrangements at a clinic called DOCS on Central Avenue, Yonkers, New York for Louise to be examined. He brought her for the examination and paid for same. It was as a result of that examination that they learned Louise was pregnant with the subject child.

Both Louise and Michael testified that in January or February, 1988 Michael made an appointment with Dr. Joan Adams, a gynecologist, to examine Louise and Michael paid for same.

On February 15, 1988 he called St. Agnes Hospital to arrange for a sonogram which was taken on February 18, 1988. Michael testified he paid $165.00 for said test.

In March of 1988, Michael bought a glider for Louise costing $310.00. Louise was complaining of back aches and had told him about this chair that eased her pain.

Because the private gynecologist was too expensive, Michael arranged for Louise to have her prenatal care at the St. Agnes

Clinic. The total cost for same was $850.00. Michael testified that in June, 1988 he reimbursed Louise the $850.00 she expended for medical care.

He further testified that after the child was born, he provided formula and diapers and whatever else Louise needed for the child.

This testimony was introduced to show "(iii) such father paid a fair and reasonable sum in accordance with his means for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child."

The next element to consider is whether Michael T. "(ii) openly held himself out to be the father of such child during such period."

Louise and Michael both learned of the pregnancy in October, 1987. Michael testified that in November, 1987 he, Louise and Lauren had Thanksgiving Dinner with the Licata family. During the dinner he advised his hosts that Louise was pregnant and he was the father. In December, 1987 they had Christmas Dinner with the DeLillo family and advised them of Louise's pregnancy.

In January, 1988 during a criminal proceeding Michael, through counsel, advised the Court that he was the father of Louise's unborn child.

Both testified that after the birth of the child, Louise brought both children (Lauren and Raquel) to baseball games in which Michael was a participant. On each occasion, Michael held the child and advsied his friends and teammates that Raquel was his new daughter.

Michael testified that prior to the birth of Raquel, Louise had mentioned placing the child for adoption. He told her he would never agree to same. Furthermore, if she could not handle the children he would take both.

Sometime in June, 1988 Louise had placed the child with the Spence-Chapin Agency. The child was there for some 20 days. On July 12, 1988 Louise had gone to Spence-Chapin to visit the child and was informed the child was not available. Raquel had been brought to a doctor for an examination. After demanding the return of the child, Louise called Michael to come to the agency. Upon his arrival, he too demanded the return of the child. Within a period of time thereafter, Louise, Michael and Raquel left the agency together.

On July 19, 1988, after the birth of Raquel, Michael T. filed a paternity petition and a custody petition in the New Rochelle Family Court on behalf of Raquel wherein he named Louise N. as Respondent.

The Court records indicate that the petitions were personally served on Louise on July 25, 1988, three days after the child was surrendered by Louise. On August, 16, 1988 Louise N. appeared before the Family Court in New Rochelle with Michael T. and his attorney Dominick Porco, Esq.. Louise N. waived counsel and a bloodtest admitted Michael T. was the father of Raquel, consented to the entry of an order of filiation and requested no support. An order of filiation was entered by the Court on August 19, 1988. The custody petition filed on July 19, 1988 was subsequently withdrawn by Michael T. on January 5, 1989 subsequent to the marriage of the parties which took place on November 4, 1988.

Both Louise and Michael acknowledge that Michael's name does not appear on Raquel's birth certificate. However, both testified that after the birth of the child, Michael visited at the hospital and came at those special times reserved only for fathers so that he could feed Raquel.

The crucial element to be proved is whether Michael "openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement." Upon a literal reading of the statute, Respondent T. does not comply. But the Court agreed to take evidence to prove a "de facto" living occurred.

All parties agree Michael and Louise had a turbulent relationship. They were suspicious of one another, they didn't trust one another. However, each testified that on several occasions each requested the other to consent to a marriage. Nonetheless, each had the company, society or comfort of the other without total obligation.

Even in light of the assaults, serious as they were, committed by Michael against Louise, they never truly separated themselves from one another. Louise received two temporary and one permanent order of protection against Michael for the beatings she received from him. Nonetheless, she continued to see him, sleep with him and after March, 1988 not violate him for breaching the order of the Court.

Admittedly, the only times that Louise and Michael physically resided together for any continuous period was from approximately April, 1987 to July, 1987 at 84 Dunwoodie Street, Scarsdale, and then for one continuous week after Louise brought Raquel home from the hospital at Louise's apartment on Collins Avenue, Mount Vernon, New York.

Both parties acknowledge they lived together "part time". The fact of the matter is they lived together whenever they found it convenient. Their relationship could in no way be characterized as "normal" or "stable". But for them it was "continuous", ongoing and constant. Regardless of the violence or suspicion each directed toward the other, they looked for and to one another.

Michael T. did not "live" with Louise in the true sense of the word. But between them their consistent behavior "created some semblance of a family unit". (In the Matter of Michael Patrick C., 83 AD 932, 933.)

In the Matter of "Female D.", 83 AD 2d 933, 935, the Court gave some indication that perhaps the statute should not be literally construed. The Court did not consider the question per se, but did open the door in stating that perhaps "*other criteria* might also serve the purpose of demonstrating that an unwed

father is available to his infant so that the father's pre-adoption consent should be required". (emphasis added.) The fact pattern presented in "Female D." did not require the Court to go beyond the statute.

However, the Surrogate of New York County did pick up the gauntlet in the Matter of "Baby Girl S." (New York Law Journel, November 10, 1988). In that case, the mother concealed the fact of her pregnancy, refused to live with the biological father and had placed the child without his knowledge, thus making it impossible for him to comply in any way with the criteria set forth in Domestic Relations Law Section 111(1)(e). With those facts before her, Surrogate Roth held "the Court therefore must determine initially whether the statute in question requires literal compliance or whether its objective was to require that an unwed father demonstrate his interest in his child by some established standards." By "other criteria".

To determine the case at bar in a strictly literal manner would not pose any difficulty.

The main element of living together was not thwarted by either party. The testimony presented implies they were both confortable with their arrangement. If the parties agreed on their own not to live together, then the Court must look for other acts which indicate the Respondent, Michael T., "manifested a significant continuous interest in his child". (Matter of "Baby Girl S." Ibid.)

In the Matter of "Baby Girl S." the Court discusses the significance of the biological connection and the necessity to develop and nurture that relationship in order to overcome strict compliance. The biological father in this case, as in Baby Girl S., "has grasped the opportunity to develop a relationship with his daughter and accepted responsibility for her future. To hold that even though he meets this test, he is not entitled to enjoy a parent's right to the companionship, care and custody of his child, 'an interest far more precious than any property right' (Santosky v. Kramer, 455 US 745, at 758), would violate the constitution."

This Court further adopts Surrogate Roth's position, in that "a literal construction of the statute would give an unwed mother the exclusive power to determine the future of her child without consulting the child's father by simply refusing to live with him for the last six months of her pregnancy. Most assuredly, such result deprives the unwed father of due process and equal protection when he has consistently demonstrated his dedication to his child (see discussion and cases cited in Lehr, at 256-261)."

The Court thus finds that the consent of Michael T. is required for the adoption herein; the petition for the adoption of Raquel Marie is denied.

The Court will not consider the mother's claims of fraudulent consent and subsequent revocation.

Furthermore, Respondent Michael T.'s motion for summary judgment on the ground that the subsequent marriage of the parties entitled him to retroactive "veto power" is denied.

Louise T.'s motion for visitation is moot.

The Petitioners are directed to forthwith return the child Raquel Marie to the Respondents Michael and Louise T..

This decision shall constitute the order of the Court.

Dated: May 10, 1989.

E N T E R,

/s/ Louis A Barone

HON. LOUIS A. BARONE, J.F.C.